

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 GAMCO INVESTORS, INC., et al.,
4 Plaintiffs,

5 v.

03 Civ. 5911 (SAS)
09 Civ. 7962 (SAS)

6 VIVENDI, S.A. and
7 VIVENDA UNIVERSAL, S.A.,

Conference

8 Defendants.
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9
10 New York, N.Y.
February 18, 2013
11 10:00 a.m.

12 Before:

13 HON. SHIRA A. SCHEINDLIN

14 District Judge

15 APPEARANCES

16
17 ENTWISTLE & CAPUCCI
18 Attorneys for Plaintiffs
19 BY: VINCENT R. CAPPUCCI
EVAN T. RACITI
20 ARTHUR NEALON
ASHLEY GRAHAM

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22 Attorneys for Defendants
23 BY: PAUL C. SAUNDERS
TIMOTHY CAMERON
24 MARGOT A. MILLER
XIAO LIU
25

1 (Case called)

2 MR. CAPPUCCI: Vincent R. Cappucci for the plaintiffs.

3 MR. NEALON: Arthur Nealon for the plaintiffs.

4 MR. RACITI: Evan Raciti for the plaintiffs.

5 MS. GRAHAM: Ashley Graham for the plaintiffs.

6 MR. ALPERT: Bruce Alpert.

7 MR. SAUNDERS: Paul Saunders for the defendant.

8 MR. CAMERON: Timothy Cameron, your Honor, for the

9 defendant.

10 MR. BUSHNELL: George Bushnell, in-house counsel for

11 Vivendi.

12 MS. MILLER: Margot Miller for the defendant somebody

13 for the defendant.

14 MR. LIU: Xiao Liu for the defendants.

15 THE COURT: Good morning everyone. I hope my staff

16 told you I'd like to have opening statements. Mr. Cappucci?

17 MR. CAPPUCCI: Good morning, your Honor. May it

18 please the Court. Vincent R. Cappucci for the plaintiffs. I

19 first would like to extend our thanks on behalf of my myself

20 and my colleagues and our client for the Court opening its

21 doors on a federal holiday.

22 THE COURT: I was going to thank you all for coming

23 today and getting this done so I can do what I have to do later

24 in the week. Thank you.

25 MR. CAPPUCCI: We appreciate the resources and

1 acknowledge the hard work of the Court.

2 A little background is required at this juncture, your
3 opinion. Obviously, this trial is on the limited issue of
4 reliance and whether defendant Vivendi has presented evidence
5 or will present evidence to rebut the presumption of reliance.
6 That is the only issue before the Court.

7 But I would be remiss if I did not remind the Court
8 that this is against the backdrop of an extensive trial in the
9 class action case where the jury returned a verdict finding
10 that Vivendi made 57 false and misleading statements about its
11 businesses in the marketplace in this relevant period of 2000
12 to 2002.

13 Your Honor is, of course, further familiar with the
14 issues particular to this case by reason of it adjudicating the
15 motions on summary judgment. I'm not going to go into that
16 order and recite the observations of the Court. The Court is,
17 obviously, skilled in these issues.

18 One point was made by Vivendi which has been
19 withdrawn, and there was an argument in the brief that our
20 client had access to and/or knowledge of corrective nonpublic
21 information from meetings or correspondence with Vivendi which
22 they had presented and argued in their papers. That has been
23 withdrawn. There is now a concession by Vivendi that there is
24 no such evidence. Vivendi does not contend that plaintiffs
25 possessed any nonpublic corrective information about Vivendi's

1 relative statements or representations during the relevant
2 period.

3 Again, your Honor, this is relevant, particularly in
4 view of the Court's observation that in a situation where you
5 are not dealing with material nonpublic information, it was
6 difficult to envision where the plaintiff would not rely on
7 market price.

8 Your Honor, if I may perhaps preview some of the
9 evidence. It will be shown, contrary to the arguments which my
10 colleagues -- learned colleagues, with great resources, as you
11 can see today -- have presented. It will be shown that the
12 Gabelli entities indeed relied on market price and indeed
13 relied on the integrity of market price for each of their
14 transactions in the Vivendi ADRs. Of course, the ADRs are the
15 only issue in this case, not the ordinary shares.

16 Market efficiency, your Honor, has been stipulated to.
17 It has been stipulated to by the parties. The evidence will
18 show that Mr. Mario Gabelli, the senior portfolio manager who
19 made principally most, if not all, of these investment
20 decisions and was responsible for, as you will see from the
21 testimony, responsible for the overall portfolio decisions to
22 invest in Vivendi, that he believed that the market price
23 reflected all material public information concerning the
24 company and that the market price efficiently processed this
25 information into price.

1 We have stipulated to market efficiency. But you're
2 going to hear from our clients that they believed indeed that
3 the market served as a vehicle to impound and process all the
4 information. He believed that, they believed that. That will
5 be shown. There no question about that.

6 Indeed, in that regard, our clients never would have
7 purchased the securities of this company or any company had
8 they believed the market price was artificially inflated. For
9 that purpose they relied on the price as to be free of that
10 artificial inflation. Beyond that, they would not have
11 invested in this company had they believed there would have
12 been a fraud. Without describing the fraud, they certainly
13 would not go into a crooked dice game, a crooked crap game, as
14 the cases refer to.

15 As the cases speak and what is important here, the
16 Gabelli entities never assumed that the market price was
17 incapable of being efficient, was not an efficient digesting of
18 public information. It is important to know that they relied
19 on that, as I said before.

20 Counsel is going to rest his entire argument, your
21 Honor, on a financial model. It's called PMV. You heard about
22 it in the briefing on the summary judgment. You're going to
23 hear, unfortunately, your Honor, quite a bit about it today, I
24 would suppose, from Andrew Rittenberry the junior analyst at
25 Gabelli.

1 These are worksheets. Unfortunately, we are going to
2 have to walk you through the model and show you what's there.
3 The significance of PMV has been completely overblown, if not
4 misunderstood, by Vivendi. Its importance in the investment
5 decision has been overblown, if not completely misunderstood.

6 There is no evidence or testimony that PMV was used
7 side by side in decisions to purchase securities, that a PMV
8 number was there, market price was there, and our clients
9 looked at the two on an investment-by-investment basis. Simply
10 not the case.

11 The very importance of this model, the evidence was
12 never developed in the depositions your Honor. Unfortunately,
13 you're going to have to hear about that. The Court I hope will
14 appreciate that PMV is simply a projected model, a projected
15 model of what a hypothetical unknown industrialist would pay
16 for the businesses, almost as if there was a takeover, your
17 Honor.

18 It assumes that the industrialist is sitting here
19 today. If that industrialist is not sitting here today, the
20 model is speculative. The model is understood to be
21 hypothetical, yet the way it is being presented by my
22 colleagues here is if that person, the Henry Kravis, is sitting
23 here, and therefore the imputed values and the projections that
24 we assume, and the multiples, that it is all a given, it is all
25 truthful, and it's going to happen today. That's simply not

1 the case.

2 It is a projection out. It's a projection of what
3 could happen, what may happen. In fact, it looks at a 2- to
4 5-year horizon as the evidence will show. Mr. Gabelli
5 testified at his deposition that PMV is not a determinant, and
6 you will hear from him what role that played in his investment
7 decision.

8 Your Honor, this is not a case like Basic, where the
9 false information was already in the marketplace and/or where
10 the plaintiff knew about the misrepresentation and traded on
11 that information nonetheless. It is a very different case.
12 Indeed, our client relied on price.

13 Your Honor, much fanfare has been made about the word
14 "intrinsic." We need to talk a little bit about that. I need
15 to preview the significance of that. Your Honor is, of course,
16 aware of the decisional authority which uses the word
17 "intrinsic value." I'm not going to go into that analysis.

18 All I'm going to ask is let's find out if the use of
19 the terminology "intrinsic value" in the loose marketing
20 materials that refer to that word and present it in some of the
21 documents that the Court will be shown today, let's make sure
22 that's the same term and the same term of art that's being used
23 in the case law. Let's find out what the witnesses believe
24 that term to mean, if they all mean the same thing. That's
25 going to be important.

1 I think what you are going to find, your Honor, is
2 that the meaning of "intrinsic" in terms of the way some of the
3 Gabelli folks use that term, it means in built-in value over
4 time. It's almost a seed that will grow into a tree, what will
5 happen to this company intrinsically, not the intrinsic value
6 today at a given time at the point of the transaction.

7 That is important, your Honor. We would appreciate
8 and hope that the Court will listen very carefully to that
9 testimony to clarify the terminology. We are going to be very
10 concerned about the questions that are asked using that word.
11 They may object.

12 Another point that is made in the papers and the
13 submissions which I will expect my learned colleague to present
14 today is the issue of our client's access to management. Yes,
15 there are letters in the record, your Honor, where my client
16 Mr. Gabelli so politely applauds Mr. Messier and thanks him for
17 meetings. Yes, there are indications that were on conference
18 calls. Your Honor, this is completely typical. It is not
19 special.

20 There was no special access. We were one of so many,
21 of so many who were given the same invitations. Companies
22 typically have days upon which they invite investors in,
23 one-on-ones. The conference calls that our clients run, you
24 will hear, on a quarterly basis, there could be 500 people on a
25 call.

1 When Vivendi had some of its calls, they gave the
2 phone number out. Your Honor has a vast experience going back
3 to the IPO cases, I know. I'm just saying it's got to be put
4 in context. They have characterized the special access. The
5 evidence will show it wasn't special. It's typical, it's
6 ordinary.

7 Frankly, your Honor, for them to question our due
8 diligence after all of these market resources, no one uncovered
9 this fraud. No one uncovered this fraud. Despite all these
10 industry analysts, sophisticated institutions, news agencies
11 globally that were following this company, no one uncovered it.
12 But because we had three meetings, we should have uncovered it?
13 Why would they have told us something different? Why would
14 they not have said the same things? I think we are at least
15 deserving of that presumption because there is no evidence that
16 we had special access.

17 Lastly, your Honor, Mr. Saunders and his colleagues I
18 assume are going to present evidence about our trading later in
19 the period as it is suspect, why would we do it. Let's look at
20 what happened here. We come into this stock at the end of year
21 2000 as a result of the Seagram's merger. Basically, your
22 Honor, a year passes. Vivendi is reporting terrific, great
23 results.

24 2002 is the critical year where things start to really
25 unwind. The corrective disclosure period is from January 7th

1 to August 14th. It's 8 months. There are 10 corrective
2 disclosures and/or significant events in that period. 6 of
3 them happened, and we really don't do anything. As the price
4 is coming down and coming down and coming down, we don't do
5 anything.

6 But a month before the end of the relevant period
7 there's a management change. New management come in, and
8 there's buying. You're going to hear from Mr. Gabelli why they
9 did it, what his recollection is as to why they went in and
10 bought significantly.

11 But understand you had a major price drop, your Honor,
12 enormous price drop, and you had events I think which would
13 support a renewed investment decision. If we have to put it in
14 the record, we'll look to what Vivendi was saying before it
15 talked about the full truth. Even as late as July of '02, one
16 month before the end of the relevant period, they are making
17 positive statements: We have enough cash for another year,
18 business is strong, assets are great, and there's going to be
19 transparency. That's new management.

20 There is a lot there. We would ask the Court to
21 listen carefully.

22 In conclusion, the parties have stipulated as to
23 damages. Your Honor is aware of that. It has the February 8th
24 of this year stipulation and order, and it has applied the LIFO
25 and market netting methodology. Those numbers are before the

1 Court.

2 We thank you again for your indulgence and look
3 forward to a very productive two days.

4 THE COURT: Thank you, Mr. Cappucci.

5 Mr. Saunders.

6 MR. SAUNDERS: Thank you, your Honor. Good morning
7 and may it please the Court.

8 As Mr. Cappucci said, because of collateral estoppel
9 and because we have stipulated with respect to the amount of
10 damages that could be awarded in the event the Court rules in
11 plaintiffs' favor, the only issue to be tried in this case is,
12 as he said, reliance. That is sometimes referred to as
13 transaction causation in the cases.

14 This Court has stated the test to be applied as
15 follows, and I quote --

16 THE COURT: Which decision are you quoting from?

17 MR. SAUNDERS: I'm quoting from your decision on
18 summary judgment.

19 THE COURT: This most recent one?

20 MR. SAUNDERS: Yes.

21 THE COURT: OK.

22 MR. SAUNDERS: "To prove reliance," and I'm quoting,
23 "the plaintiff must show that but for the material misleading
24 statement or omission, he would not have transacted in the
25 securities." So, the starting point for the analysis and for

our presentation is that reliance is a but-for test: But for the misrepresentation, the plaintiff would put have purchased the security in question.

This Court then goes on to note that there are two ways in the case law to prove reliance. First, that a plaintiff was aware of the company's statements, misrepresentations, and engaged in the relevant transaction based upon that specific misrepresentation. We don't have that here. There's no allegation of what I would call direct reliance in this case.

Then this Court went on to say, again quoting, "Under certain circumstances the plaintiff is entitled to a rebuttable presumption that she relied on the integrity of the market price of the security. Specifically, an investor who bought stock at the market price may avail herself of the presumption that," and these are the key words, "she relied on the integrity of the price set by the market if the market is efficient."

This Court went on to explain, quoting from the Teamsters case in the Second Circuit, "The fraud on the market theory involves two rebuttable presumptions: First, that the misrepresentation affected the price of the securities traded on an open market, and second," and this is the key issue to be tried in this case in our submission, and I'm quoting, "investors relied on the market price of securities as an

1 accurate measure of their intrinsic value." That's from your
2 Honor's opinion on the summary judgment. In the summary
3 judgment opinion you were quoting the Second Circuit in the
4 Teamsters case. You could have quoted a couple of other Second
5 Circuit cases as well.

6 We take those propositions of law as our starting
7 point in this case. We will prove that GAMCO did not rely on
8 the market price of the Vivendi ADRs in question as an accurate
9 measure of their intrinsic value. We will prove the opposite.

10 We will prove that GAMCO only purchased Vivendi ADRs
11 when their market price was lower and, in their words, trading
12 at a discount to the price that GAMCO calculated as
13 representing the true intrinsic value of the stock. GAMCO
14 called that price the private market value. You're going to
15 hear a lot about that in this case.

16 We don't expect the plaintiffs to deny, and I don't
17 think Mr. Cappucci denied, that GAMCO in fact calculated the
18 private market value for the stocks that it purchased in
19 general and in particular for the Vivendi ADRs. What Mr.
20 Cappucci said in his opening was that they relied on the market
21 price. What he did not say, and what I don't think his
22 witnesses will say, is that they relied on the market price as
23 an accurate measure of the intrinsic value of the security in
24 question. That is what the presumption requires.

25 I'm going to demonstrate very, very briefly, your

Honor, during the course of this opening, very briefly, from GAMCO's own documents as to which there is no objection, how GAMCO went about using the private market value, how they calculated it, and how they went about using that as the decision point to purchase Vivendi ADRs. That is, they would only purchase if the private market value price was significantly higher than the public market price.

Before I do that, your Honor, I ought to say just a brief word about the plaintiffs. There are basically two categories of plaintiffs in this case. We have the GAMCO investor accounts, individual accounts for which GAMCO was the money manager and had complete discretion to decide what securities to buy. I'll refer to those as the GAMCO investors. The corporate structure of the Gabelli enterprises is a little bit hard to follow, at least for me.

The second category of plaintiffs are mutual funds. There are six mutual funds who remain as plaintiffs in this case. The investment research for both categories of plaintiffs was prepared by an entity called Gabelli & Company, and in particular with respect to Vivendi was performed by an investment analyst named Andrew Rittenberry. He is in fact in court today and he is going to be our first witness. Mr. Rittenberry performed the analysis, calculated the private market value for Vivendi ADRs, and he would then make a buy, sell, or hold recommendation.

1 During the relevant period, which is from October 30,
2 2000, to August 14, 2002, Mr. Rittenberry never made a sell
3 recommendation with respect to Vivendi, either ordinary shares
4 or ADRs. Why? Because I think he will tell your Honor, as he
5 told us in his deposition, that his analysis showed that during
6 that entire period the Vivendi private market value that he
7 calculated as the intrinsic value for Vivendi -- I'm going to
8 use those words deliberately -- was always higher than the
9 public market price, and that's why he never recommended to the
10 portfolio managers that they sell Vivendi stock.

11 Mario Gabelli, who founded the GAMCO enterprise and is
12 still the chief executive officer and the chief investment
13 officer for many of the portfolios managed by the Gabelli
14 enterprise, attended the Columbia Business School after
15 college. When he went to Columbia, he was exposed to a theory
16 of investing that has since become known as value investing.

17 It was a theory propounded by two legendary professors
18 at Columbia Business School, who I don't think Mr. Gabelli had
19 the opportunity to study under, since they were there long
20 before he went to Columbia. Their names were Benjamin Graham
21 and David Dodd. You're going to hear some more about the
22 Graham and Dodd method of value investing. I think it would be
23 fair to say that Graham and Dodd are considered today the
24 fathers of value investing.

25 In short, their theory, and it's important because Mr.

1 Gabelli later adopted their theory, their theory was that the
2 stock market, public market, which they called Mr. Market, was
3 fickle and irrational and that the stock prices on the public
4 market did not necessarily reflect the true values of the
5 securities in question.

6 Rather, they concluded that the intrinsic value of a
7 company's stock, something that a private investor, the
8 industrialist that Mr. Cappucci was talking about, would in
9 fact pay for the company. That was a far more stable and more
10 accurate representation, in their view, of the intrinsic value
11 of the security.

12 Mr. Gabelli studied under professors at Columbia who
13 had studied under Graham and Dodd, and he took their notion and
14 he refined it either further. He created this notion that we
15 have heard about called the private market value, and he came
16 up with a way, a template, for calculating the private market
17 value of a security in which he was interested in possibly
18 investing.

19 His documents, what Mr. Cappucci said notwithstanding,
20 throughout -- I'm going to show your Honor some of these --
21 referred to the private market value as the intrinsic value of
22 the security, their words.

23 What Mr. Gabelli then did was to add something to the
24 Graham and Dodd analysis. He said to himself, and he'll say I
25 think in court tomorrow, if the private market value is higher

1 than the public market price, how do I know the public market
2 price is ever going to go up to the private market value? If I
3 buy, how do I know it's ultimately going to reach what I think
4 is the true intrinsic value of the security?

5 He said in order to do that, he needed to come up with
6 something that would unlock the true intrinsic value of the
7 security and, in his words, to surface the true intrinsic value
8 so that the public market price would rise to the private
9 market value that he calculated. He called that something a
10 catalyst, his word. A catalyst is something that he thought
11 would unlock or surface the private market value so that the
12 market price would rise to that level.

13 In fact, he was so proud of that phrase "private
14 market value with a catalyst" that he trademarked it. It is a
15 trademark. I hope I'm not infringing his trademark even by
16 referring to it. He trademarked that phrase, it was so
17 important. That was the key to his investment methodology.

18 Your Honor, if I might take just a moment and display
19 just a few pages, three or four pages from the document that
20 you are going to see that will demonstrate the points that I
21 just made and will illustrate the GAMCO investment methodology.
22 I have prepared a book. With your permission, if I may
23 approach, I can hand it up to your Honor and to the clerk and
24 to Mr. Cappucci. Thank you.

25 In the book that I just handed to your Honor, there is

1 a table of contents that describes what is behind each tab.

2 These are not the entire exhibits. These are only just a few
3 pages from exhibits as to which there is no objection.

4 The first exhibit is Exhibit G behind tab 1. This is
5 an excerpt from a PowerPoint presentation that was used at an
6 internal planning session at Gabelli, at the GAMCO companies,
7 in Greenwich in January 2001, at the Greenwich library. This
8 was an internal presentation, but the record will show that
9 everybody in the GAMCO enterprise was invited to attend this
10 planning session.

11 Just a few pages of this you will see, your Honor.
12 The first page says that the Gabelli Asset Management Company
13 has a unique approach to mispriced equities. If I can pause
14 just for a second on that phrase. "Mispriced equities," I
15 think the evidence will show, means equities that are trading
16 in the public market below their private market value. Mr.
17 Gabelli came up with a unique approach to those mispriced
18 entities. He claimed to be expert in identifying the
19 catalysts, as this page says, and so forth.

20 If your Honor will look at the next page from
21 Exhibit G, you see again this is from the GAMCO document, the
22 evolution, according to Mr. Gabelli, of value investing. He
23 starts at the bottom with Graham and Dodd, who I just spoke
24 about. He adds Warren Buffett as another disciple of value
25 investing, and then he puts himself at the top. Under Gabelli,

he has private market value and catalyst, because that is the core of their investment methodology.

The next page then talks about methodology, focus on cash generating franchise businesses. That was an idea that was brought to the table by Mr. Buffet. Second, calculate the private market value. Third, analyze earnings per share and cash flow. Fourth, evaluate management.

And the fifth, identify catalysts to realize returns. You see some examples of what a catalyst might be. It could be a takeover. It could be an impending change in regulation. It could be a change in management, something that would unlock this private market value.

What you don't see in this methodology is any reference to the public market price as an accurate measure of the intrinsic value of the security. It's not there.

If you look at the next page. You're going to hear testimony about this chart, and I'm going to give you a very, very brief run-through about how I think the evidence will demonstrate this chart works.

On the left-hand side you see a great big sort of sideways square which is labeled "Universe of Companies." I think that that means all of the companies traded on the public stock exchanges. That's the universe from which a candidate might be selected.

Once a candidate is selected for analysis, the first

step in the process, at the very top of this chart, is "analyze PMV of company." That's something that Mr. Rittenberry would do. He would look at the company, take available public information, and calculate the private market value, which is primarily asset-based, what are the assets worth, primarily but not entirely, and what would a knowledgeable industrialist pay for the company.

Underneath that you see a diamond shape, and it says "PMV" question mark. I think the evidence will show that what that means is that if the private market value is higher than the public market price, you continue the analysis. If it's not, you go over to the left, which says "monitor the company" and stop. That is, you don't go any further.

If the private market is in fact higher than the private market price, the analysis continues. The investment analyst or others might visit the company. Mr. Rittenberry did and Mr. Gabelli did visit Vivendi. Then the analyst would look to see whether or not there was a catalyst. If the catalyst was not present, the analysis stopped, they are done. But if the catalyst is present and if the private market value is higher than the public market price, the stock is added to the buy list. That's what happens at the bottom.

Then, you see on the left-hand side of the buy list there is an arrow going up that says "surface values." I think the evidence will show that what that means, your Honor, is

1 that if the catalyst actually came into play and the intrinsic
2 value was in fact surfaced, the price would go back up, the
3 market price would go up to equal the private market value, and
4 at that point they sell, because there is no reason to continue
5 the investment after that.

6 If you look at the document behind page 2, tab 2, your
7 Honor, that's a page from Defendants' Exhibit Z. That's a page
8 from the annual report of one of the mutual funds. In the
9 middle of the page you see a reference to Mr. Market. This is
10 again prepared by Gabelli. This is an annual report prepared
11 for investors, describing how they go about investing in stocks
12 and what they do. There is a description, a quote, from
13 Professor Benjamin Graham about Mr. Market and what Mr. Market
14 means.

15 The key part of this page is the last paragraph under
16 the heading "Mr. Market." This is Mr. Gabelli talking. This
17 is from an article that he wrote for a magazine, which I have
18 to admit, your Honor, I have never actually read or ever
19 actually even seen, called Cigar Aficionado, of which I am not
20 one.

21 Mr. Gabelli wrote, "It is our and every prudent
22 investor's job to try to determine the intrinsic value of an
23 individual company or the market as a whole. At any given
24 point in time, intrinsic value is largely a function of
25 earnings and interest rates. Whether stocks trade at, above,

1 or below intrinsic value is a function of investor psychology.
2 Mr. Market is the code name the traditional value investor uses
3 to personify investor psychology."

4 The evidence will also show that they and Mr. Gabelli
5 refer to Mr. Market as irrational and sometimes euphoric and
6 sometimes depressed. But what is missing from this is any
7 indication that the public market price is thought by the
8 Gabelli enterprises to be an accurate measure of the intrinsic
9 value of the security in question.

10 Under tab 3 there is another description from
11 Exhibit N of the investment process used by the Gabelli
12 entities. This is taken from a presentation that was given to
13 Gabelli stockholders at an annual meeting at the Pierre Hotel
14 in May of 2001. The first page simply describes investment
15 process. That's what was being described to the stockholders.
16 The second page simply says analysts follow stocks on an
17 industry basis, which they did.

18 The third page says, and I quote, "Identify intrinsic
19 value of each business." It doesn't say look at the stock
20 price, the public market price, to get the intrinsic value. It
21 says do something else to identify the intrinsic value.

22 The next page is EBITDA, earnings before interest,
23 taxes, depreciation, and amortization. And, following that,
24 PMV, which I think we know now to be private market value.

25 Then it says "Investment process. Select stocks with

1 a 2-year 50 percent return potential." The significance of
2 that, your Honor, and Mr. Gabelli and Mr. Rittenberry and Mr.
3 Woodson will all reinforce this point, is that GAMCO was a
4 long-term investor. They didn't pay attention to short-term
5 ups and downs in the stock market. They were a long-term
6 investor.

7 That's one of the reasons why the evidence will show
8 they weren't concerned about Vivendi's liquidity crisis. They
9 said that is a crisis that is a short-term phenomenon, we are a
10 long-term investor. I think actually some of the documents say
11 between 2 and 5 years, not just 2 years. But they wanted a 50
12 percent return potential within a period of at least 2 years
13 and I think sometimes between 2 and 5 years.

14 The next page describes what might be an industry
15 catalyst. I mentioned that before. The next page, the last
16 page, I think, in my submission, this is the most critical
17 document that I could show to your Honor to illustrate the
18 point that I'm making. The document is headed "PMV v. Mr.
19 Market: The Graham and Dodd Approach."

20 You see on this chart a solid line and then a dotted
21 line. The evidence will show that the solid line is the
22 private market value and that the dotted line is the public
23 market price of the particular security in question. If the
24 public market price is below the private market value, the
25 solid line, they buy. If the catalyst occurs and the public

1 market price rises to meet or exceed the private market value,
2 they sell. That is the key to the GAMCO investment
3 methodology. This is from their documents.

4 The point of all this is that what is missing from
5 this analysis is any indication that Gabelli, GAMCO, ever
6 relied on the public market price as an accurate measure of the
7 intrinsic value of the securities in question. Their analysis
8 was exactly the opposite.

9 Now, not only did they describe to their investors
10 that this is how this methodology worked in theory, but they
11 went one step further. Believe it or not, they actually used
12 Vivendi as an example that they showed to their stockholders of
13 how this methodology works in practice. Under tab 4 you see
14 another page from the very same presentation given to the
15 shareholders in May of 2001.

16 The evidence will show that this page demonstrates
17 that the number at the top of the page, E73, is 73 Euros, and
18 that was the market price of the Vivendi common stock on
19 whatever day that is being measured on this chart occurred.

20 Then this chart shows how the private market value
21 would be computed. Content. Vivendi had content, media
22 content, movies, television shows, and so forth. That was
23 valued at 36 billion. Connectivity, cellular telephone
24 companies, your Honor has heard all about those, 39 billion.
25 Other, 37 billion. Leading to a private market value. 111

1 Euros divided by the number of shares outstanding yields a
2 private market value of 100 Euros.

3 Again, this is the document they showed to their
4 investors, which showed that as a result of this methodology,
5 this would be a buy, Vivendi would be a buy. There is another
6 page in the same document, which I won't take the time to show
7 you, which shows the opposite. It shows an example of a
8 company whose public market price is above the private market
9 value, and that would be don't buy or sell.

10 We would submit that the evidence will show very, very
11 clearly that the GAMCO investors did not rely on the public
12 market price as an accurate measure of the intrinsic value of
13 the security. Their investment methodology and their practice
14 was exactly the opposite.

15 In your Honor's opinion you observed that one fact
16 that might inform whether or not an investor relied on the
17 public market price as an indication of true value is what the
18 pattern of purchases shows. I think in the GAMCO brief they
19 made the argument that only one-third of their purchases were
20 made after the corrective disclosures began to be made. We
21 have gone back and looked at that.

22 Your Honor, under tab 5 is a document that we created,
23 to which I think there is no objection if used for illustrative
24 purposes only, and that is the only reason we are doing this.
25 The dates in the left-hand column are the dates that Dr. Nye

1 testified in the class action constituted the dates on which
2 the disclosures began to be made starting in January of 2002
3 and ending in August of 2002. The middle part of this is just
4 taken from Dr. Nye's chart in the class action.

5 What we did is simply add on to the right-hand side of
6 this the purchases that were made by GAMCO on these dates. I
7 think there should be a summary page. If you look behind tab
8 6, there is a summary page. We have broken the purchases down
9 into three periods: Purchases made before Dr. Nye's first
10 disclosure date; second, purchases made between Dr. Nye's first
11 and last disclosure date; and finally, purchases made on or
12 after Dr. Nye's last disclosure date.

13 What your Honor will see from this chart is that, if
14 my math is right, your Honor, the mutual funds increased their
15 purchases by over a hundred percent and the GAMCO investor
16 accounts increased their purchases by over 200 percent during
17 the period after the disclosures began to be made. I can give
18 that to your Honor only because your Honor noted in your
19 opinion that that was one fact that might inform your Honor's
20 decision.

21 Your Honor, that concludes my opening statement. I'm
22 happy to answer any questions. If not, we will proceed.

23 THE COURT: Thank you. Ready to proceed.

24 MR. SAUNDERS: Your Honor, it might be helpful before
25 we call the first witness simply to move into evidence the

1 defendants' exhibits as to which there is no objection. I have
2 a list of those which I can hand up to your Honor's clerk.

3 THE COURT: I probably have it in the pretrial order.

4 MR. SAUNDERS: The exhibits have changed as a result
5 of discussion. I have a list that I'm happy to hand your
6 Honor.

7 THE COURT: All right.

8 MR. CAPPUCCI: Your Honor, is it possible that we do
9 this on a per exhibit basis?

10 THE COURT: No. I prefer this method. I usually do
11 this at trials. Have you looked at this two-page --

12 MR. CAPPUCCI: Yes, your Honor. I believe there are
13 objections. These are not agreed to. There are objections, I
14 believe, to these exhibits.

15 THE COURT: To which ones?

16 MR. CAPPUCCI: I'm sorry. Stipulated. These are OK.

17 THE COURT: All right.

18 MR. SAUNDERS: There are other exhibits as to which
19 there is an objection.

20 MR. CAPPUCCI: I was under the impression he was
21 moving all his exhibits.

22 THE COURT: No, no.

23 MR. CAPPUCCI: Sorry.

24 THE COURT: Rather than read all these exhibit labels
25 into the record, I think I'll mark this two-page list as Court

1 Exhibit 1, and all of the exhibits in Court Exhibit 1 are now
2 received in evidence.

3 (All exhibits in Court Exhibit 1 received in evidence)

4 MR. SAUNDERS: May I move into evidence for
5 illustrative purposes only the charts to which I referred
6 during my opening?

7 THE COURT: Sure. But some of them are going to be
8 actual evidence.

9 MR. SAUNDERS: All but the last two are actual.

10 THE COURT: That is confusing. The last two, which
11 were for illustration only, are received solely for that
12 purpose. The remainder will come in as evidence.

13 MR. CAPPUCCI: Thank you, your Honor.

14 MR. SAUNDERS: Your Honor, we call as our first
15 witness Mr. Andrew Rittenberry.

16 (Continued on next page)
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1 THE COURT: Please remain standing. Raise your right
2 hand.

3 ANDREW RITTENBERRY,

4 called as a witness by the Defendant,

5 having been duly sworn, testified as follows:

6 THE COURT: All right. One moment.

7 Mr. Cappucci, are you all set?

8 MR. CAPPUCCI: Yes. Thank you, your Honor.

9 THE COURT: All right. We're ready to go.

10 MR. SAUNDERS: Your Honor, in order to help move
11 things along, I have another binder that I've prepared of the
12 exhibits to which I intend to -- about which I intend to
13 examine Mr. Rittenberry. And with your Honor's permission, I
14 would hand up a set to your Honor and one to the witness.

15 THE COURT: Okay.

16 MR. SAUNDERS: And of course one to Mr. Cappucci.

17 THE COURT: Okay.

18 MR. SAUNDERS: And we have an extra copy for the
19 clerk.

20 THE COURT: Oh good. Thank you.

21 MR. SAUNDERS: And one for me.

22 May I proceed, your Honor.

23 THE COURT: Please.

24 - - - - -

1 DIRECT EXAMINATION

2 BY MR. SAUNDERS:

3 Q. Mr. Rittenberry, would you please tell us very briefly
4 about your educational and employment background.

5 A. Yeah. I attended the University of Virginia. Worked on
6 the sell side for a company called Robinson Humphrey in
7 Atlanta, Georgia. I attended Columbia Business School. I
8 graduated in the year 2000. Began employment at Gabelli, I
9 believe, in July 2000. I worked there for about
10 three-and-a-half years. And I moved to a company called
11 Jennison Associates here in New York City. I work there today.
12 I'm a managing director on the value team at Jennison
13 Associates.

14 Q. So you haven't been employed by Gabelli in any capacity
15 since middle -- early 2004, is that correct?

16 A. Correct.

17 Q. All right. By which Gabelli entity were you employed
18 during that period?

19 A. I believe Gabelli & Company.

20 Q. And is it correct that Gabelli & Company, among other
21 things, performed investment analysis for other Gabelli
22 investments?

23 A. Yes.

24 Q. And is it correct that your job was that of an investment
25 analyst?

1 A. Yes.

2 Q. Could you tell the Court very briefly what an investment
3 analyst does in general, or in particular what you did at
4 Gabelli & Company?

5 A. I was essentially assigned to follow the media industry and
6 the cable television industry globally and keep track of all
7 the company -- Gabelli -- sorry, the other side of the firm,
8 Gabelli's holdings in that industry, and also just to keep
9 track of general trends in the industry overall and communicate
10 those to the people making the investment decisions at Gabelli.

11 Q. So, did you actually make the investment decisions
12 yourself --

13 A. No.

14 Q. -- as an investment analyst?

15 A. No.

16 Q. So what would you do as an investment analyst?

17 A. I would essentially follow the industry, talk to the
18 portfolio managers about what's going on in the industry, if
19 they had questions, and I would build the models that the firm
20 used to analyze private market value.

21 Q. And at the end of the analysis would you make a
22 recommendation to the portfolio managers?

23 A. If they asked, it was a verbal recommendation. Verbal
24 recommendation, yes.

25 Q. And that recommendation would either be buy, sell or hold?

1 A. Yes.

2 Q. Now, did there come a time -- withdrawn.

3 What was your title at Gabelli & Company during this
4 period?

5 A. I believe it was vice president. I can't remember
6 actually.

7 Q. Did you get a promotion during this period?

8 A. I did, yes. I'm not sure when.

9 Q. So did there come a time when you were asked to cover
10 Vivendi as one of the companies that you analyzed?

11 A. Yes.

12 Q. And did that occur early in your tenure at Gabelli &
13 Company?

14 A. I believe so, yes.

15 Q. And did you begin --

16 MR. SAUNDERS: I'm doing a little bit of leading, your
17 Honor. I hope that's all right.

18 Q. Did you begin analyzing Vivendi before the merger with
19 Seagram's?

20 A. No. I believe it was after. I'm not sure when that merger
21 closed.

22 Q. In December of 2000, if that helps you.

23 A. Okay, yeah. I started looking at after it was announced
24 but before it closed. I guess that's the answer.

25 Q. And then throughout all of 2001 and throughout all of 2002,

1 you continued to follow Vivendi, did you not?

2 A. Yes. Yes.

3 Q. Were you the only analyst who followed Vivendi during that
4 period?

5 A. As far as I know.

6 Q. Now, who had responsibility for calculating the private
7 market value of Vivendi during this period?

8 A. I did.

9 Q. Did you at the end of the day make recommendations to
10 others inside the GAMCO enterprises about Vivendi as a
11 potential investment?

12 A. Yes.

13 Q. And what was your recommendation during the period from the
14 end of 2000 until the middle of 2002?

15 A. It was either buy or hold. I'm not sure when, when it was
16 buy, when it was hold. I think I discussed that at my
17 deposition.

18 Q. If I could use the phrase relevant period to be from the
19 period October 30, 2000, to August 14, 2002, will you
20 understand what I'm referring to?

21 A. Yeah.

22 Q. During the relevant period did you ever recommend to anyone
23 at GAMCO that it sell Vivendi common stock or ADRs?

24 A. Not that I recall.

25 Q. Not that you recall?

1 A. Not that I recall.

2 Q. Did your analysis make a distinction between ADRs on the
3 one hand and ordinary shares on the other hand of Vivendi?

4 A. No, other than that they -- one traded in one currency,
5 another one traded in another currency. So --

6 Q. Except for that, your analysis was the same for both?

7 A. Yes. Yes. Yes.

8 Q. Perhaps you could explain to the Court very, very briefly
9 what an AES or ADR is?

10 A. An ADR is a share of a foreign security that trades in the
11 United States. In dollars, reference to a foreign security
12 that trades in another currency.

13 Q. Did you make recommendations with respect to Vivendi
14 directly to Mr. Gabelli during the relevant period?

15 A. Yes.

16 Q. Do you remember him ever disagreeing with any of your
17 recommendations?

18 A. No. I don't recall one way or the other, would probably be
19 a better answer.

20 Q. Now, during the relevant period, did you believe that the
21 public market price of Vivendi, ADRs, was an accurate measure
22 of their intrinsic value?

23 MR. CAPPUCCI: Objection to form, your Honor. Use of
24 the term intrinsic. Lacks foundation.

25 THE COURT: Well, I don't know if it lacks foundation.

1 I can't help but notice the use of the word in Gabelli's own
2 materials in the opening statement.

3 MR. CAPPUCCI: Let him ask the witness if he has an
4 understanding of the term.

5 THE COURT: He could do that, or he could show him the
6 very exhibits I was shown, which are Gabelli documents that use
7 the word.

8 MR. SAUNDERS: I will do that, your Honor.

9 THE COURT: Yes. Here we go. I'm going to show you
10 Defendant's Exhibit N, which is a PowerPoint slide show, ask
11 you to look at it for a minute, about four or five pages. Take
12 a look at that.

13 THE WITNESS: Can you repeat the question? I
14 apologize.

15 THE COURT: All I asked was to take a look at that,
16 just for a minute. It's a PowerPoint slide show of Gabelli, as
17 you see.

18 Have you looked at it?

19 THE WITNESS: Yeah.

20 THE COURT: Wait. Stick with it. Can you see on the
21 third page, it says identify intrinsic value of each business?

22 THE WITNESS: Yes.

23 THE COURT: You've certainly seen that word used in
24 Gabelli documents, right?

25 THE WITNESS: Yes.

1 THE COURT: What does it mean?

2 THE WITNESS: In this instance here, I believe it's
3 referring to the private market value. We usually talked about
4 private market value, you know, versus intrinsic value. That
5 wasn't a phrase we used very often.

6 THE COURT: Versus intrinsic value.

7 THE WITNESS: We just talked about private market
8 value. And you know that's what I -- I never heard it
9 described as intrinsic value.

10 THE COURT: You see it on the slide.

11 THE WITNESS: I see that, but I don't remember
12 discussing that.

13 THE COURT: So that has no meaning to you, is that
14 what you're saying?

15 THE WITNESS: No, it does. I'm just saying we didn't
16 talk about that regularly. But I would assume this is
17 referring to private market value.

18 THE COURT: Okay. So you're saying now you think
19 they're interchangeable?

20 THE WITNESS: That's what that appears to be referring
21 to.

22 MR. CAPPUCCI: Your Honor, he hasn't answered the
23 question. He has not answered your question.

24 THE COURT: That's really for me to decide. He
25 answered the question. You may not like the answer. It may

1 not be clear to you, but I heard an answer.

2 Mr. Saunders, you're welcome to continue the question.

3 MR. SAUNDERS: Your Honor, let me put the question

4 that I asked before there was an objection.

5 BY MR. SAUNDERS:

6 Q. Mr. Rittenberry, during the relevant period, did you
7 believe that the public market price of Vivendi ADRs was an
8 accurate measure of their intrinsic value?

9 MR. CAPPUCCI: Note my objection.

10 THE COURT: Overruled.

11 A. Meaning private market -- interchangeable with private
12 market value? I do not believe that public price approximated
13 the private market value of the securities.

14 Q. All right. Now, how did you learn how to compute the
15 private market value of a particular company or stock?

16 A. You know, basically just trial by fire. Kind of, you know,
17 learning from other analysts at the firm and talking to
18 Mr. Gabelli about the process.

19 Q. What exactly --

20 A. There was not a formal training process.

21 Q. All right. In your understanding, what exactly is a
22 private market value?

23 A. My understanding is that -- and as I calculated it, the
24 private market value -- essentially what we do is look at each
25 business the company was in. And -- you know, as long as that

1 business was reported separately in the financial statements.
2 And we would look at what we thought an informed industrialist
3 in the same industry would have paid for that asset; if that
4 asset was to be, you know, put into an auction and there was a
5 corporate buyer in the private markets, what they would pay for
6 that business. And, you know, we summed all those pieces up
7 and subtracted the liabilities. So that's, you know, what --
8 essentially what the firm is worth, if it was sold in pieces.

9 Q. Well, why wouldn't you just look at the public market
10 price?

11 A. I don't know. That's not what I was -- what I was taught
12 to do.

13 Q. Taught where?

14 A. That's not -- that wasn't our -- that's not what I was -- I
15 was assigned to compute the private market value.

16 THE COURT: When you say -- he said taught where. You
17 mean at Gabelli?

18 THE WITNESS: At Gabelli, yes.

19 Q. Could you look at Exhibit G in the book of exhibits.

20 A. Yeah.

21 Q. Now, in my opening statement I referred the Court to a
22 couple of pages from this document. And in particular, I would
23 ask you to look at -- beginning on page 055.

24 MR. CAPPUCCI: Your Honor, I object. There's no
25 foundation the witness ever saw the document.

1 THE COURT: I'm sorry. Is there an objection to
2 Exhibit G in evidence?

3 MR. CAPPUCCI: Not to the extent -- it's a corporate
4 document, but he hasn't laid the foundation as to whether the
5 witness has ever seen the document. And it's 100 pages long.

6 THE COURT: It's 100 pages long. Well --

7 MR. CAPPUCCI: So there's a risk of out-of-context
8 testimony.

9 THE COURT: I don't know. If it's in evidence, do we
10 know when this document was prepared? It obviously is a
11 program. It has an agenda. It says, annual planning seminar
12 January 13, 2001.

13 Were you at the company at that time?

14 THE WITNESS: I was.

15 THE COURT: You were. Were you part of this annual
16 planning seminar at the Greenwich Library?

17 THE WITNESS: Unfortunately I was.

18 THE COURT: So you saw this hundred-page document at
19 the time?

20 THE WITNESS: I'm not sure I saw it or not --

21 THE COURT: Well, you attended?

22 THE WITNESS: I was in attendance.

23 THE COURT: Then I'm sure you saw it, don't you think?

24 THE WITNESS: Probably.

25 THE COURT: Foundation is laid. Let's get to page 55.

1 BY MR. SAUNDERS:

2 Q. Page 55 --

3 THE COURT: Hold on I got to get there, too.

4 Does that start with evolution of value investment?

5 MR. SAUNDERS: Yes, your Honor.

6 THE COURT: Have you gotten to page 55?

7 THE WITNESS: Yes.

8 BY MR. SAUNDERS:

9 Q. I guess I should ask, before I ask any more questions, did
10 you prepare any part of this document before the meeting?

11 A. Not to my knowledge.

12 Q. Do you know who did?

13 A. No.

14 Q. With respect to this page, under Graham and Dodd it says --

15 MR. CAPPUCCI: Hold on. Got it.

16 Q. Do you know who Graham and Dodd are?

17 A. Yes.

18 Q. Who are they?

19 A. They were professors at Columbia Business School back in
20 the 1920s, I believe.

21 Q. And do they have any relationship with value investing?

22 A. Yeah. They're essentially the -- some of the original
23 thinkers that laid out the tenets of value investing.

24 Q. What exactly is value investing?

25 A. You know, buying a security that is -- you know, depending

on how you determine what it's worth, you know, that it trades at a discount to what you think it's worth temporarily, that it's going to be -- and that discount is going to narrow over time, and the investor is going to make money as the discount between market price and whatever source of -- whatever your estimation of value is is those two numbers moved together. And if that discount narrows, you're going to make money as a value investor.

Q. So just to make sure the record is clear, when you say discount, are you referring to the difference between the public market price of a security on the one hand and what you would calculate as its true value or intrinsic value --

A. Yeah.

Q. -- or private market value on the other hand?

A. Yes.

Q. So if there's a difference, you would call that difference a discount?

A. Yes.

Q. And a discount would apply if the private market value was higher than the public market price, right?

A. Yes.

Q. Okay. So under Graham and Dodd, it says invest in businesses, not in stocks. Did you -- while you were at Columbia or Gabelli, did you ever come to have any understanding of what that meant?

1 A. I mean, it's just the basic statement that you should --
2 when you invest, you should buy a good business, not -- you
3 know, not necessarily a story. And you're not just -- you
4 know, you're not buying -- you're not trading in stocks for
5 the -- you know, without the underlying business fundamentals
6 behind you, behind your investment thesis.

7 Q. When you were at Gabelli, did you ever hear the phrase
8 Mr. Market?

9 A. Yes.

10 Q. And what did you understand that to mean?

11 A. You know, I think you discussed it in your opening
12 statement. You know, essentially that the market is sometimes
13 irrational over certain time periods, and, you know, that
14 provides the opportunity for a value investor, when those --
15 when the -- however you determine value, what that is and what
16 Mr. Market says it is are often not the same number. And that
17 provides opportunity.

18 Q. Would Mr. Market be the public stock market?

19 A. Yes.

20 Q. So when you say irrational, you mean that the public stock
21 market price might be different from what you calculate as the
22 true value of a stock?

23 A. Yes.

24 Q. And at the very top of the page we're looking at, it says
25 Gabelli private market value and catalyst. Could you explain

1 to her Honor what a catalyst is, to make sure my description of
2 it was correct?

3 A. Yeah. I mean, a catalyst could be any number of things,
4 but essentially what you described in your opening, that's some
5 dynamic that the investor thinks is going to help surface value
6 over time.

7 Q. By surface --

8 A. Surface value meaning narrow the discount between the
9 current market price and the value, what you perceive to be the
10 value in the stock.

11 Q. So surfacing the value would be basically something that
12 would cause the public market price to rise to the level of the
13 value that you computed?

14 A. Yes.

15 Q. If you look at page 57 of this Exhibit, I showed her Honor
16 this page during my opening. Perhaps you could just take us
17 through this very briefly to make sure that my description of
18 what this page represents was correct.

19 MR. CAPPUCCI: Your Honor, I'm sorry to interrupt.
20 I'm not getting a live feed. I don't want to interrupt the
21 live testimony. Can my tech guy kneel down here while we're
22 conducting the examination?

23 THE COURT: Sure.

24 MR. CAPPUCCI: Thank you very much. I'm sorry.

25 A. It's basically just a general schematic that lays out the

rough investment process that we went through as analysts at Gabelli.

Q. All right. So on the left-hand side, the sideways square says universe of companies. Would that be all of the companies on the stock market?

A. Yeah. I mean, whatever -- whatever universe you chose, but that's -- as an analyst, my universe was media, the media industry.

Q. All right. So then the --

A. Publicly traded securities in the media industry.

Q. First box on this value investment process document says, analyze PMV of company.

A. Yes.

Q. And we've talked about that. And that is something that you would do as the analyst for Vivendi at Gabelli?

A. Yes.

Q. Now, in the next box it says PMV, question mark. What is your interpretation of that box?

A. This looks like a decision tree, so I assume it's -- if the discounts of the PMV is material, then you would do further research. If not, you would just monitor it so you understand what's going on in the industry. Or it might be a future opportunity.

Q. So would it be fair to say that that box represents what would happen if the private market value was either higher or

1 lower than the market price?

2 A. Yes.

3 Q. And if the private market value that you computed for given
4 security was lower than the private market -- than the public
5 market price, what does this decision tree indicate that you
6 would do in that case?

7 A. Sorry. Can you repeat that? Just make sure --

8 Q. If the private market value was lower than the public
9 market price for a given security, according to this decision
10 tree, what would you do?

11 A. You'd stop and do nothing.

12 Q. Stop and do nothing?

13 A. Yeah.

14 Q. You wouldn't buy the stock?

15 A. Correct.

16 Q. All right. So just to be clear, so that if your
17 calculation --

18 A. I wasn't making an investment -- I wasn't making investment
19 decisions, though. I would consider this in my analysis but --

20 Q. You were making recommendations?

21 A. Yes.

22 Q. You were making recommendations, correct?

23 A. Yes.

24 Q. All right. So let me just limit my question to what kind
25 of recommendation you would make. Your -- if your calculation

of the private market value was the same as the public market price, you would not recommend that Gabelli buy the stock, correct?

A. Correct.

Q. You would only recommend that Gabelli buy the stock if the private market value was higher than the public market price, right?

MR. CAPPUCCI: Objection to form.

THE COURT: What's the objection?

MR. CAPPUCCI: Foundation. What time?

THE COURT: He doesn't -- oh, no, he does.

You recommend? You make recommendations?

THE WITNESS: Yes.

THE COURT: Made?

THE WITNESS: Yes.

THE COURT: Yes. So I don't see the lack of foundation.

MR. CAPPUCCI: Are we talking about individual or general recommendations?

THE COURT: General recommendations.

MR. CAPPUCCI: Okay.

THE COURT: You want the question repeated?

THE WITNESS: Please.

THE COURT: I think the question was, you would only recommend that Gabelli buy the stock if the private market

1 value was higher than the public market price, right?

2 THE WITNESS: Yes.

3 MR. SAUNDERS: All right.

4 BY MR. SAUNDERS:

5 Q. Now, going further --

6 A. I would say also materially higher, not -- you know, if
7 this -- if the -- this counter private market value is
8 5 percent, it's still going to be doing nothing, it has to
9 be -- it has to be a material discount --

10 THE COURT: Okay.

11 A. -- to private market.

12 Q. Or significant discount, would you say?

13 A. Significant -- well, material or significant, either one.
14 Same. Same definition in my --

15 Q. All right. And I take it you apply that methodology when
16 you made recommendations with respect to Vivendi ADRs?

17 A. Yes.

18 Q. Now, continuing with this decision tree on page 57,
19 Exhibit G, there's a -- on the right-hand side a PMV, question
20 mark. There's a diamond that says visit company. Would it be
21 correct to say that this chart illustrates what would happen if
22 you computed that the private market value was significantly
23 higher than the public market price?

24 A. Yes.

25 Q. And so?

1 A. You might visit the company anyway, just to monitor it, but
2 that doesn't -- that doesn't matter necessarily.

3 Q. Did you, in fact, visit Vivendi during the time that you
4 were an investment analyst at Gabelli?

5 A. Yes.

6 Q. And first in the chart, looking only at the chart, why
7 would the -- why would you visit the company if the private
8 market value is higher than the public market price?

9 A. I visited because Mr. Gabelli told me -- I went with him to
10 visit basically, but we probably would not visit them if we
11 thought the private market value was higher than the -- I mean,
12 the stock -- the stock -- private market value was lower than
13 the stock price.

14 Q. You would only visit if the private market value was higher
15 than the market price?

16 A. Yeah.

17 Q. You did, in fact, visit Vivendi during the relevant period?

18 A. Yes.

19 Q. With Mr. Gabelli?

20 A. Yes.

21 Q. Did you meet privately with Mr. Messier during that period?

22 A. What's your definition of "privately"?

23 Q. You, Mr. Gabelli, maybe Mark Gabelli, Mr. Messier, maybe
24 Mr. Hannezo?

25 A. Yes. And I think investor relations staff was there, too.

1 Q. Somebody from Vivendi investor relations staff?

2 A. Yeah.

3 Q. But no other members of the public?

4 A. Not -- no.

5 Q. On how many occasions did you do that during the relevant
6 period?

7 A. I believe two.

8 Q. And how long did each meeting take?

9 A. Probably an hour.

10 Q. Did you take any notes during that meeting?

11 A. Yes.

12 Q. What happened to your notes?

13 A. I left them at Gabelli when I left the firm.

14 Q. All right.

15 A. In a file cabinet.

16 Q. What was discussed at those meetings?

17 A. I don't recall.

18 Q. Anything at all?

19 A. I mean, I think I -- I think I had mentioned at my
20 deposition that we -- I remember discussing general strategy of
21 the company and what the CEO's vision for the company was, you
22 know, for the coming -- the coming years. But that's all the
23 detail I remember.

24 Q. Did you discuss anything that was not public knowledge
25 already?

1 A. I don't know. I don't recall.

2 Q. You don't recall?

3 A. I don't recall.

4 Q. All right. So going back to the chart, after the visit to
5 the company, then there are two decision trees, decisions. The
6 one on the left says catalyst not present, and the one on the
7 right says catalyst present. What do those refer to?

8 A. Well, you have to think there's a catalyst to surface value
9 to be interested in purchasing the security. If there's not a
10 catalyst, then you do nothing.

11 Q. And did you determine that there was a catalyst with
12 respect to Vivendi ADRs?

13 A. I don't recall what the catalyst was.

14 Q. No, I'm not asking you what it was. I'm just asking you
15 whether or not you determined that there was, in fact, a
16 catalyst.

17 A. I don't recall.

18 Q. Would you have made a buy recommendation if there was not a
19 catalyst?

20 A. Potentially, but I don't recall -- I don't recall what the
21 catalyst was.

22 THE COURT: Without knowing what it was, is it part of
23 the recommendation process to identify whether or not there is
24 one?

25 THE WITNESS: There is, yes.

1 THE COURT: Okay. So generally speaking, if there is
2 one, then you recommend a buy, is that right?

3 THE WITNESS: Yes.

4 THE COURT: And if there's not one, you stop?

5 THE WITNESS: Yes.

6 THE COURT: All right.

7 MR. SAUNDERS: All right. Thank you.

8 BY MR. SAUNDERS:

9 Q. And then if the catalyst is present according to this chart
10 on page 57, the stock goes on the buy list. What does that
11 mean?

12 A. I don't know actually. I was wondering myself.

13 Q. All right.

14 A. I don't believe there was a buy list that I knew of.

15 Q. All right. But Gabelli did, in fact, buy Vivendi ADRs
16 during this period, right?

17 A. I'm not sure. I --

18 Q. All right. Fair enough.

19 A. I mean, I know now they did, but I did not know whether he
20 was trading in the securities at the time.

21 Q. All right. You certainly recommended that Gabelli buy
22 Vivendi during this period, right?

23 A. Yes. If he asked, I would -- yes.

24 Q. All right. Let me ask you --

25 MR. SAUNDERS: I'm going to a slightly different

1 subject, your Honor, and that's exactly how the PMV was
2 calculated. I'm at your Honor's pleasure with respect to
3 whether you want me to continue or take a break.

4 THE COURT: I take a break at exactly 11:30 all the
5 time, which is five whole minutes from now.

6 MR. SAUNDERS: We have four minutes, your Honor, and
7 I'll use them.

8 THE COURT: Exactly.

9 BY MR. SAUNDERS:

10 Q. Now, Mr. Rittenberry, I want to ask you in more detail
11 about how you went about calculating the private market value
12 in general, and then in particular with respect to Vivendi.
13 How did you do that?

14 A. Is that a question?

15 Q. Yeah. How did you calculate the market value?

16 A. I thought that was a preface to a question.

17 Essentially I laid out all the information, the
18 financials, based on the publicly available securities filings.
19 I projected the business performance of those difference pieces
20 of the business over a five-year period, based on my judgment
21 as I thought about the industry dynamics and what was going on
22 in those different industries that the company operated in.
23 And then I applied a multiple for each one of those businesses,
24 a cashflow multiple based on our estimate, my estimate of what
25 an informed buyer would pay for each one of those businesses.

1 And typically that was based on transactions that had taken
2 place in those businesses, in those various businesses.

3 Q. All right. Sir, so would it be correct to say that one of
4 the first steps in your analysis would be to compute what you
5 thought the various assets of the company in question were
6 worth?

7 A. Yes.

8 Q. And once did you that, would it be fair to say that you
9 then would apply a multiple to those assets to determine --

10 A. To the cash flow generated by those assets.

11 Q. I'm sorry. A multiple to the cash flow generated by those
12 assets --

13 A. Yes.

14 Q. -- for the purpose of determining what somebody would --
15 what an industrialist would pay for those assets?

16 A. Yes.

17 Q. And would it also be fair to say that your determination of
18 what the multiple was or should be was based upon your judgment
19 as an analyst?

20 A. It was judgment, but, you know, typically -- typically we
21 looked at prior transactions in the same industry, and that
22 informed our judgment as to what the multiples should be at
23 that point in time.

24 Q. All right. So if, for example, a company with similar
25 assets sold those assets for two or three times their cash

1 flow, hypothetically --

2 A. Yes.

3 Q. -- you would say, well, the multiple that I should apply
4 to a similarly situated company would be two or three times
5 cash flow?

6 A. Yes, assuming there's similar assets and circumstances.

7 Q. Yes.

8 A. Yes.

9 Q. And did you, in fact, do that analysis for Vivendi --

10 A. Yes.

11 Q. -- during the relevant period?

12 A. Yes.

13 Q. All right. If you would look, please, at Defendant's
14 Exhibit AU.

15 MR. SAUNDERS: Defendant's Exhibit AU, your Honor, is
16 already in evidence.

17 THE COURT: Is it in this book?

18 MR. SAUNDERS: It's in the book of exhibits that I
19 gave you a moment ago. It's toward the end.

20 THE COURT: Oh. Oh, okay. Yes.

21 MR. SAUNDERS: We've lettered the defendants' and
22 numbered the plaintiff's exhibits.

23 THE COURT: I've got it, AU.

24 BY MR. SAUNDERS:

25 Q. Do you have that, Mr. Rittenberry?

1 A. Yes.

2 Q. Could you tell the Court what Defendant's Exhibit AU is.

3 A. It's a spreadsheet that calculated private market value.

4 Q. For Vivendi?

5 A. For Vivendi. It looks like it was from January 2001.

6 THE COURT: How do you know that?

7 THE WITNESS: It says market price up in the top left
8 corner. It says -- you have balance sheet as of --

9 THE COURT: Oh, yeah.

10 THE WITNESS: -- December '00 and market price as of
11 January 11, 2001.

12 THE COURT: Yes, I see that.

13 BY MR. SAUNDERS:

14 Q. Now, just so that we understand exactly what this chart is,
15 is it correct that when you -- I'm sorry. Withdrawn.

16 Did you prepare this chart?

17 A. I believe so.

18 Q. Is it correct that when you prepared this originally at
19 Gabelli, you did it as -- on an Excel spreadsheet?

20 A. Yes.

21 Q. So what we have here is a printout from the Excel
22 spreadsheet?

23 A. Yes.

24 MR. SAUNDERS: And, your Honor, when this was produced
25 to us, there were three different sections to it. I've tabbed

those sections A, B and C, because that's the way the document was produced to us. But I only intend to ask Mr. Rittenberry about the first page --

THE COURT: Okay.

MR. SAUNDERS: -- of this exhibit.

THE COURT: Okay. And that does seem to bring us to 11:30, when I always take the recess. So given we have no jury, I'm sure we can get back in ten minutes. So let's reconvene at 20 of 12:00.

(Recess)

MR. SAUNDERS: May I proceed, your Honor.

THE COURT: Please.

BY MR. SAUNDERS:

Q. Mr. Rittenberry, do you have Defendant's Exhibit AU?

A. Yes.

Q. All right. Now, on the left-hand side of Defendant's Exhibit AU, what is being described there in general terms?

A. Just the current enterprise value of the company based on the market price and the debt on the balance sheet, less cash and less the -- the investments the company has.

Q. All right. And then at the top portion of the right-hand side of the first page of Defendant's Exhibit AU, what is being displayed there?

A. That's just the arraying the data, laying out the data for the private market value by business segment.

1 Q. I'm sorry. I think there's a miscommunication. I'm
2 referring to the top part --

3 A. Sorry.

4 Q. -- of the right-hand side.

5 A. I was talking about the right-hand side of the chart. The
6 top of the chart is just the consolidated revenue, an EBITDA of
7 the company. And the little box underneath it is the current
8 multiple that the stock is trading at, the enterprise value
9 EBITDA basis.

10 Q. And there are columns that begin in 1999 and go out to
11 2004. Would it be correct to say that some portion of that
12 would be projections?

13 A. Yes.

14 Q. Is that what the P means?

15 A. Yes.

16 Q. All right. And then underneath that there's a box that is
17 entitled private market value or analysis consolidated basis.
18 What does that box represent?

19 A. That's what I was describing before. That's essentially
20 the -- these are all the segments of the company that separate
21 financial reporting on. So it's each one of those segments
22 projected out to 2004. And the multiple of cash flow is used
23 to ascertain the value of each business. And we -- you add
24 that up and then subtract the liabilities at the bottom and add
25 the investments that they have to come up with the private

1 market value year by year.

2 Q. All right. So on this particular page at the bottom of the
3 first column, 1999, it says private market value per share in
4 Euros, 60.22?

5 A. Yes.

6 Q. And what does that represent?

7 A. That's my analysis of what the private market value was
8 during the year 1999.

9 Q. For Vivendi?

10 A. For Vivendi.

11 Q. And the next column, 2000, that would be your projection
12 for what the private market value would be for that year?

13 A. Yes. This was in -- this was in January 2001, but the
14 yearend financial statements had not been published yet. So
15 it's still just a projection.

16 Q. And the same would be true for the other columns to the
17 right of that column?

18 A. Yes.

19 Q. Correct?

20 A. Yes.

21 Q. All right. Now, underneath where it says PMV per share,
22 there's another entry that says current market slash -- hyphen
23 discount to PMV. What is that?

24 A. That's the difference between the market price in the top
25 left corner and the estimate of private market value.

1 Q. Was the market price of the Vivendi securities a factor in
2 calculating the private market value?

3 A. No.

4 Q. Would it be fair to say that it's never a factor in any
5 private market value of anything?

6 A. You know, not in the way that I was displaying it here. I
7 mean, in my -- in my usage of it, it would not be a factor.

8 Q. It would not be a factor. So it would be fair to say that
9 market price was not a factor that you used in calculating the
10 private market value for Vivendi securities?

11 A. Yes.

12 Q. Did you ever use it as a factor in calculating the private
13 market value for any security while you were at Gabelli?

14 A. No. The only thing I would note here is that -- like this
15 company had investments in public companies. Vivendi
16 Environmental was one. We -- when we added -- when we created
17 our private market value, we used the market value of that
18 security in our analysis here --

19 Q. All right. But I --

20 A. -- as a rough approximation of what it was worth.

21 Q. Right. But --

22 A. But in terms of in general, thing -- no, the answer is no.

23 Q. My question was: Was the public market price of Vivendi
24 securities a factor in computing the private market value of
25 Vivendi?

1 A. No.

2 Q. Was the private market value an important part of your
3 recommendation to buy, sell or hold Vivendi stock?

4 A. Yes.

5 Q. Was it the main factor in making your recommendation?

6 A. I would say yes -- you know, the two main factors are what
7 the private market value is and how significant is the discount
8 between the public securities price and the private market
9 value.

10 MR. CAPPUCCI: Could you please read that answer back.

11 (Record read)

12 BY MR. SAUNDERS:

13 Q. And again, when you say "the discount," you mean the
14 difference between the public market price and the private
15 market value?

16 A. Yes.

17 Q. Did you, from time to time, update your private market
18 value analysis of Vivendi?

19 A. Yes.

20 Q. And would you do that every time additional information
21 became available?

22 A. Yes.

23 Q. And would you do that in your Excel spreadsheet?

24 A. Yes.

25 Q. And to whom did you make this Excel spreadsheet available?

1 A. Anyone who asked for it that worked at Gabelli.

2 Q. Do you remember anybody in particular who might have asked
3 for it during the time that you were there?

4 A. Mr. Gabelli.

5 Q. Mr. Gabelli?

6 A. Mario Gabelli.

7 Q. He would ask to see it?

8 A. He would ask to see it.

9 Q. Did he ever write notes on it?

10 A. He did.

11 Q. He did?

12 A. Yeah.

13 Q. Did he ever tell you why he wanted to see it?

14 A. Occasionally -- I mean, he would -- he would ask for it,
15 and not without -- not always tell me -- a couple times I
16 remember he asked me for it because he was having a phone call
17 with the -- he had a phone call with someone from the company.
18 And he wanted the -- he wanted to see the model, wanted it
19 while he had the discussion. And he would ask -- when we went
20 to visit the company, he would ask for it prior to that so he
21 could look at it.

22 Q. By "the company" you mean Vivendi?

23 A. Yes, the company.

24 Q. Now, Mr. Rittenberry, what is or was a morning meeting?

25 A. Essentially all the analysts would meet in the morning

1 before the market opened with Mr. -- Mr. Gabelli was usually
2 there or on the telephone. And we would discuss, you know, any
3 events happening in our industry, or specific items happening
4 with our companies that we thought would be appropriate to
5 discuss with Mr. Gabelli.

6 Q. And who attended the morning meetings?

7 A. Anyone in the firm was welcome to. All the analysts
8 that -- Gabelli & Company analysts were there. And as I said,
9 using Mr. Gabelli, they also broadcast the meeting over the --
10 over speakers throughout the firm so people could listen from
11 outside the meeting room.

12 Q. And how long would the morning meetings last?

13 A. An hour -- usually an hour.

14 Q. And did they take place every day?

15 A. Yes.

16 Q. And did you ever make presentations at morning meetings
17 with respect to Vivendi during the relevant period?

18 A. I don't know that I actually made a presentation, but I
19 discussed it with -- at the morning meeting.

20 Q. And what would you discuss about Vivendi?

21 A. Well, a lot of times Mr. Gabelli led the questioning. So
22 he would ask -- he might come in with a question about Vivendi.
23 If they reported earnings, I thought there was something worth
24 mentioning, I would discuss that in the morning meeting or some
25 other event in the newspapers, etc.

1 Q. And did you ever discuss your buy, sell or hold
2 recommendations during the morning meetings?

3 A. I do not recall actually. I believe so but ...

4 Q. All right. Who was Mark Gabelli? Who is Mark Gabelli?

5 A. Mark Gabelli is Mr. Gabelli's son.

6 Q. Did he work at --

7 A. He worked at Gabelli, yes. He might still work -- I'm not
8 sure if he still works there or not.

9 Q. Who is Vincent Roche?

10 A. Vincent Roche worked for Mark Gabelli. He was a trader for
11 Mark. He traded securities for Mark Gabelli. Mark Gabelli was
12 a portfolio manager, or is a portfolio manager.

13 Q. Let me see if I can do this very quickly. Would you look
14 very quickly at Defendant's Exhibit K in your book. Can you
15 identify that for us?

16 A. E-mail from me to Mark Gabelli and Vincent Roche, sending
17 them my model on Vivendi, my private market value model.

18 Q. So the model would have been similar to what we saw on
19 Exhibit AU?

20 A. Yes.

21 Q. And in this e-mail you refer to your number as being more
22 conservative than some of the sell side guys. What does that
23 mean?

24 A. Wall Street analysts in general that published on the
25 company, published research on the company.

1 Q. When you say more conservative, sir, what does that mean?

2 A. What I'm referring to here, I believe, is I assigned less
3 value in my private market value analysis to the Internet
4 assets that the company owned. And why I did that was because
5 there were not reliable private market transactions to look at
6 for these Internet assets, because they didn't produce cash
7 flow. And, you know, it was -- the businesses were not well
8 established and were not -- there were not a lot of -- there
9 were not a lot of mergers to use to create the value of these
10 assets in my private market model here.

11 Q. All right. If you would look briefly at Defendant's
12 Exhibit L. Can you tell us what that is.

13 A. It's like an e-mail correspondence between me and one of
14 the portfolio managers, saying that my PM -- I still have a PMV
15 calculation of 94 Euros.

16 Q. Was that higher than the market -- public market price for
17 Vivendi at the time?

18 A. I don't recall, but I believe -- I believe it was.

19 Q. All right. And you see at the bottom of this page there's
20 an e-mail to you from Mr. Woodson?

21 A. Yes.

22 Q. And he says, quote, I still have a target of E100?

23 A. Yes.

24 Q. What does that mean?

25 A. I assume he had his own target that he did himself.

1 Q. That would be a target for the private market value?

2 A. I assume so.

3 Q. For Vivendi?

4 A. I assume so. I don't know -- I don't know that he was
5 looking at it in terms of private market value, but he was a
6 portfolio manager based in London.

7 Q. All right. If you look at Exhibit N.

8 MR. SAUNDERS: Again, this is a document I showed your
9 Honor during my opening, in particular beginning at page 0042.

10 THE COURT: Just to forestall the objection, this
11 would be page one of it, it's the 16th annual meeting at the
12 Pierre Hotel, May 12, 2001, of the company.

13 Do you see the cover page?

14 THE WITNESS: Yes.

15 Q. Did you attend that meeting?

16 A. I did, yes.

17 MR. SAUNDERS: I'm sorry. I didn't hear your Honor.

18 THE COURT: Same question as you asked.

19 So you were there?

20 THE WITNESS: I was there, yes.

21 THE COURT: You were there. Now we can go -- what
22 page did you want to go to?

23 MR. SAUNDERS: Beginning at page 0042. I'm just going
24 to go through very quickly the pages, then I'll show your
25 Honor.

1 THE COURT: Yes.

2 BY MR. SAUNDERS:

3 Q. Are you with me, Mr. Rittenberry?

4 A. Yes.

5 Q. Then this purports to be describing the investment process,
6 I take it, at GAMCO?

7 A. Yes.

8 Q. And the next page says, analyst follow stocks on an
9 industry basis. Would that be referring to people like you who
10 followed the media --

11 A. Yes.

12 Q. -- industry --

13 A. Yes.

14 Q. -- for example?

15 A. Yes.

16 Q. And then in the next page, it says, investment process
17 identifying intrinsic value of each business. Do you see that?

18 A. Yes.

19 Q. What does that mean to you?

20 A. Identify the private market value of each business.

21 Q. I'm sorry. I didn't hear the end.

22 A. Identify the private market value of each business.

23 Q. Of each business, okay. And then the next page says
24 EBITDA. Do you see that?

25 A. Yes.

1 Q. What role would that -- first of all, what is EBITDA, and
2 second, what role would that play in the analysis?

3 A. EBITDA is earnings before interest taxes, depreciation,
4 amortization. It's a proxy for free cash flow before cap X
5 from an enterprise. And it's used a lot in merger and
6 acquisition analysis. When buying and selling companies,
7 that's a typical metric that is used in the process.

8 Q. All right. That's not based on the public market price, is
9 it?

10 A. No.

11 Q. And then the next page, 0047, says, also under the heading
12 investment process, select stocks with a two-year 50 percent
13 return potential. What do you understand that to be referring
14 to?

15 A. Looks pretty self-explanatory. By -- you know, the goal in
16 buying a stock is to have it appreciate 50 percent over a
17 two-year period. Straightforward, I --

18 Q. All right. Did -- I think I referred in my opening to the
19 fact that from time to time Gabelli might refer to a slightly
20 longer window.

21 A. I heard him say that, yes.

22 Q. And does -- what can you tell us about whether or not that
23 is true?

24 A. I don't recall.

25 Q. You don't recall one way or the other, right?

1 All right. The next page says identify catalysts.

2 And could you tell her Honor what that refers to?

3 A. These are just examples of potential catalysts that might
4 help surface value for a company.

5 Q. That is, if some of these things occurred, the public
6 market price would go up; is that what you're referring to?

7 A. Yeah. I mean, these could be negative catalysts as well.
8 It could be positive or negative, but --

9 Q. Positive or negative?

10 A. Yes.

11 Q. But things that might affect the public -- market price
12 things that --

13 A. Yes, correct.

14 Q. All right. Then the next page, the one that I referred the
15 Court to at the beginning, says PMV versus Mr. Market. This is
16 page 0049. Do you see that, sir?

17 A. Yes.

18 (Continued on next page)

19

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25

1 Q. In the course of my opening, I think I said to the Court
2 that my reading of this was that the solid line with the two
3 arrows on each end refers to the private market value. Would
4 you agree with me?

5 A. I assume so.

6 Q. And that the dotted line underneath that on the left and
7 above that on the right would be a reference to the public
8 market price?

9 A. It appears to be.

10 Q. It says "PMV v. Mr. Market." Is this the same Mr. Market
11 that you referred to earlier?

12 A. I believe so.

13 MR. CAPPUCCI: Objection to form.

14 THE COURT: I will allow it.

15 A. I believe so.

16 Q. Then it says "The Graham and Dodd approach," and that is a
17 reference to the value investing approach articulated by
18 Professors Graham and Dodd at Columbia?

19 A. Correct.

20 Q. How would you read this chart?

21 A. It looks like a simple schematic. You buy at a discount to
22 private market value and you sell at or about private market
23 value, when the public price is at or above private market
24 value.

25 Q. So Gabelli would buy stock if the private market value was

1 above the public market price, correct?

2 A. In theory, yes.

3 Q. And sell stock when the public market price was equal to or
4 higher than private market value, correct?

5 A. Yes.

6 Q. Would you look briefly at Exhibit V, Defendants' Exhibit V.

7 A. Yes.

8 Q. This exhibit purports to be morning meeting notes.

9 MR. SAUNDERS: Your Honor, I should note that I
10 believe, and Mr. Rittenberry can help us, I believe that the
11 date is wrong. I believe that the date is probably August
12 2002.

13 MR. CAPPUCCI: Your Honor, we will stipulate to that.
14 That's correct.

15 THE COURT: OK.

16 Q. First of all, what is this document?

17 A. This is just a document that Gabelli & Company sent to the
18 portfolio managers after the morning meeting that basically has
19 kind of the four or five important bullet points that were
20 discussed during the morning meeting on each company that was
21 discussed. It might have been sent to outside people as well.
22 I'm not sure.

23 Q. If you look at page 003 of Exhibit V, do you have that,
24 sir?

25 A. Yes.

1 Q. At the bottom of the page there is an entry under

2 "Vivendi."

3 A. Yes.

4 Q. First it says V. I take it that is the stock market
5 symbol?

6 A. Yes.

7 Q. Then it says, dollar sign \$12?

8 A. Yes.

9 Q. What would that be a reference to?

10 A. That's the market price of Vivendi on that date.

11 Q. The market price.

12 MR. SAUNDERS: Your Honor, I actually checked the
13 market price. On August 14th the market price was \$11.66. So
14 I think we are talking something roughly in that time period.

15 Q. Then it says "Andrew Rittenberry." Did that suggest that
16 you made this presentation?

17 A. These were just the things I said at the meeting. We
18 usually type these up. The analysts would type these up before
19 the meeting and then discuss them at the meeting.

20 Q. Did you in fact discuss these topics at the morning
21 meeting?

22 A. Yes, I believe so.

23 Q. The first one is new CEO Fortou, sent letter to
24 shareholders Sunday night. Do you see that, sir?

25 A. Yes.

1 MR. SAUNDERS: Again, your Honor, I think Mr. Cappucci
2 can probably confirm this, there was a letter sent by Mr.
3 Fortou on Sunday, August 18th, 2002, which appears to be the
4 letter that is being described. I don't think anything flows
5 from that particular information. As your Honor told me once
6 before, that may be TMI.

7 Q. Then it says, Mr. Rittenberry, "PMV above 50." Do you see
8 that?

9 A. Yes.

10 Q. "Stock trading on liquidity concerns which is warranted,"
11 do you see that?

12 A. Yes.

13 Q. What does that entry mean?

14 A. Essentially, I thought the PMV was 50 but there was a panic
15 in the security markets because there were liquidity concerns
16 around the company about them being able to refinance their
17 balance sheet.

18 Q. Notwithstanding that, your private market value was still
19 significantly higher than the public market price, right?

20 A. Correct.

21 Q. I take it, then, you continued to recommend that Gabelli
22 purchase Vivendi stock?

23 A. I don't recall.

24 MR. CAPPUCCI: Objection to form. No foundation for
25 that.

1 THE COURT: Did you make a recommendation?

2 THE WITNESS: I don't recall.

3 THE COURT: Would that have been your practice?

4 There's all these names of employees.

5 THE WITNESS: This was --

6 THE COURT: Let me finish. Each company has the name
7 of an employee next to it. Your name is next to Vivendi.

8 After analyzing it, do you usually either recommend sell, buy,
9 or hold?

10 THE WITNESS: Only if asked by Mr. Gabelli.

11 THE COURT: And you don't know whether you were asked?

12 THE WITNESS: I don't remember. I don't recall.

13 Q. If you had been asked, what would your opinion
14 recommendation have been?

15 MR. CAPPUCCI: Objection.

16 THE COURT: Sustained.

17 Q. You can put that exhibit aside. Let me direct your
18 attention very briefly -- before I do that, did you ever hear
19 during the relevant period that Vivendi shareholders were
20 becoming unhappy with Mr. Messier's performance?

21 A. I believe so.

22 Q. Did that affect your private market value calculation?

23 A. No.

24 Q. Did it affect whether or not you thought there might be a
25 catalyst?

1 A. Potentially, but I don't recall. I don't recall.

2 Q. Did Mr. Roche ever attend any Vivendi meetings?

3 A. In person? Attend in person?

4 Q. Yes.

5 A. I don't know.

6 Q. Did he speak French?

7 A. He did.

8 Q. Let me ask you to looked Defendants' Exhibit AA. First I
9 would ask you whether you recall ever having seen this before.

10 A. I don't recall.

11 Q. This appears to be a summary taken by Mr. Roche at the
12 Vivendi annual meeting. Do you see that, sir?

13 A. Yes. I believe he listened to a phonecall. I'm not sure
14 he was actually in-person at the meeting. Not that that's
15 relevant.

16 Q. The first entry says, "5,000 shareholders attending, crowd
17 shouting Messier quit." Do you see that?

18 A. Yes.

19 Q. Is that consistent with your recollection that you heard
20 that Vivendi shareholders were unhappy with Mr. Messier's
21 performance?

22 A. Yes.

23 Q. If you look at Defendants' Exhibit AB, do you see that,
24 sir?

25 A. Yes.

1 Q. This is an email that you apparently sent to Ken Eguza?

2 A. Yes.

3 Q. In February 2002, do you see that?

4 A. Yes.

5 Q. Who was he?

6 A. He was an analyst following Japanese companies at Gabelli.

7 Q. I take it you're sending him a copy of your PMV analysis on
8 Vivendi, correct?

9 A. Yes.

10 Q. Would that be your Excel spreadsheet?

11 A. I believe so.

12 Q. Is that what is referred to at the bottom where it says
13 Vivendi.xls?

14 A. Yes.

15 Q. In this email you say, quote, "I had to do it this way
16 because these jokers only have minority positions in some
17 units, yet they consolidate all of it and act like they have
18 access to the cash flow, which of course they don't. They only
19 have voting control. Anyway, I guess that is the European
20 way." Do you see that, sir?

21 A. Yes.

22 Q. To what were you referring?

23 A. Some of the businesses they owned, they did not own the
24 entire business, so they could not pull cash out of it whenever
25 they wanted to, essentially.

1 Q. Was that publicly available information?

2 A. Yes, at some point it was.

3 THE COURT: What does the "that" refer to? Was what
4 publicly available?

5 MR. SAUNDERS: The fact that Vivendi had minority
6 interest in certain positions.

7 A. It was publicly available.

8 Q. It was publicly available?

9 A. The minority interests were publicly available, yes.

10 Q. If it was publicly available information, why did you find
11 it necessary to remind Mr. Eguza that that is in fact the way
12 it worked?

13 A. He was asking me for an example of how to lay out a
14 Japanese company. He worked for Mario Gabelli. Mario Gabelli
15 asked him to look at this analysis as an example of a way to
16 lay out a Japanese company. A lot of Japanese companies have
17 minority interests as well.

18 Q. You're not reflecting anything that you think you knew that
19 the market didn't know in this email?

20 A. Not to my recollection. I don't know what the market did
21 or didn't know. I don't know.

22 Q. You don't know?

23 A. I don't know.

24 Q. There came a time, did there not, when you were interviewed
25 by The Wall Street Journal?

1 THE COURT: That is a question. Do you recall being
2 interviewed?

3 A. I do not recall being interviewed, no.

4 Q. Would you look at Defendants' Exhibit AC.

5 A. Yes.

6 Q. In particular, the third page of that exhibit.

7 A. Yes.

8 Q. An article written by John Carreyrou, C-A-R-R-E-Y-R-O-U?

9 MR. CAPPUCCI: Could counsel remind the witness of the
10 date of the article, please.

11 Q. The date of the article, I believe it is in 2002. February
12 12, 2002. Do you see that?

13 A. Yes.

14 Q. The lower right-hand corner of the third page, does that
15 refresh your recollection as to whether or not you were
16 interviewed by The Wall Street Journal?

17 A. Yes. I knew that I was. I just don't recall the actual
18 interview itself.

19 Q. Does this refresh your recollection about the actual
20 interview?

21 A. No, not necessarily. I remember this subject, but I don't
22 remember the exact interview contents.

23 Q. What do you remember about the subject?

24 A. I think there's another email where I referenced it. I
25 believe I was talking about the difference in U.S. GAAP versus

1 French GAAP in terms of the cash and debt numbers were
2 different, U.S. GAAP versus French GAAP.

3 Q. Is the email to which you referred in your answer
4 Defendants' Exhibit AD?

5 A. Yes.

6 Q. That's an email that you wrote to Eileen McLaughlin?

7 A. Yes.

8 Q. On February 12, 2002, the same day as the article?

9 A. Yes.

10 Q. Who is Eileen McLaughlin?

11 A. The head of investor relations in the U.S.

12 Q. At Vivendi?

13 A. She is now. I can't remember what her title was then. She
14 was in investor relations.

15 Q. At Vivendi?

16 A. A person, professional, yes, at Vivendi.

17 Q. I take it that you are writing to explain to her your
18 comments in The Wall Street Journal?

19 A. Yes.

20 Q. Would that be fair?

21 A. Yes.

22 Q. You say in your email to Ms. McLaughlin, "What I said right
23 after that sentence was, every analyst should have done the
24 same thing, is done their homework. So while it is complex to
25 value the media business at Vivendi, I do not think anyone was

1 misled in any way. Anyone who knows that there is a difference
2 in U.S. and French GAAP should have dug into the filings,
3 talked to you guys for five minutes, and figured out the
4 answer." Do you see that, sir?

5 A. Yes.

6 Q. Were you suggesting that it was not possible to figure out
7 the answers from the publicly available information without
8 talking to Vivendi for five minutes?

9 MR. CAPPUCCI: Objection to form.

10 A. No.

11 THE COURT: I'll allow it. That's not what you meant
12 by that?

13 THE WITNESS: I don't think that is the critical point
14 of that sentence. There are other ways to figure out the
15 difference in U.S. and French GAAP.

16 THE COURT: There is a comma there. It says, "Anyone
17 who knows that there is a difference in U.S. and French GAAP
18 should have dug into the files," comma, "talked to you guys for
19 five minutes" --

20 THE WITNESS: Yes. I believe I'm referencing the fact
21 that I asked them about the difference between U.S. and French
22 GAAP, because there are different rules for media companies
23 under the two accounting systems.

24 THE COURT: If you took those two steps, if you
25 figured out the difference and talked to the management people,

1 you would figure out the answers?

2 THE WITNESS: Yes.

3 Q. Why did you have to talk to the Vivendi people in order to
4 figure out the answer?

5 A. I don't know that you did have to. That's what I was
6 trying to say.

7 Q. But you did.

8 A. It was a resource for investors. Investor relations is a
9 resource for investors, potential resource. You wouldn't have
10 to talk to them to understand what the differences were
11 necessarily.

12 Q. Did you come to hear in the April 2002 time frame that
13 there was a rumor that Mr. Messier might be fired?

14 A. Not that I recall. But I believe I referenced that in my
15 deposition. I don't remember the exact --

16 Q. Would you look at Defendants' Exhibit AE.

17 A. Yes.

18 Q. What is that, sir?

19 A. This was a meeting that a French investment bank hosted.
20 They invited Mario Gabelli, and he couldn't go. He basically
21 told me to go in his place. I'm emailing him after the dinner
22 I guess the next day. Basically, this is what the French
23 bankers were saying the night before at the dinner.

24 Q. The French bankers were saying that Mr. Messier was going
25 to be sacked at the April 24, I presume 2002, meeting?

1 A. That was this person's opinion, yes.

2 Q. You heard that?

3 A. Yes.

4 Q. You were at that meeting and you heard that?

5 A. Yes.

6 Q. Now would you look at Defendants' Exhibit AG, please.

7 A. Yes.

8 Q. What is that?

9 A. It looks like an email I sent to the CFO after I attended a
10 meeting with him, I think with Mr. Messier with Mr. Gabelli in
11 April 2002.

12 Q. That was a private meeting not open to the public, was it
13 not?

14 A. It was private, yes.

15 Q. How long did that meeting last?

16 A. Probably an hour. I don't recall.

17 Q. You said in your email, "I think focusing on free cash flow
18 is key, and I think some of the European analysts that I've
19 spoken to are really missing the big picture." Do you see
20 that, sir?

21 A. Yes.

22 Q. Did you discuss in this private meeting with Mr. Hannezo
23 Vivendi's focus on free cash flow?

24 A. I don't recall.

25 Q. You don't recall. All right. Why did you write that

1 letter to Mr. Hannezo after the meeting?

2 A. Every time we met a company, we were instructed by Mr.
3 Gabelli to write a letter to thank them for having us. I
4 assume we discussed some of these things. I don't know that we
5 discussed that or not. That might have just been my opinion.
6 I don't recall.

7 Q. Did you ever ask Mr. Hannezo to help you understand the
8 Vivendi public documents?

9 A. I believe there is another email I sent to him. I don't
10 remember when it was.

11 Q. Defendants' Exhibit AK?

12 A. Yes.

13 Q. Why were you asking Mr. Hannezo to help you understand the
14 Vivendi public documents?

15 A. I was just trying to find the public documents where the
16 leverage covenants that explained the debt securities that the
17 company issued were public documents, I was asking him where I
18 could find those public documents, which public documents I
19 should look at, basically.

20 MR. SAUNDERS: Coming near the end, your Honor, I
21 think.

22 Q. Your analysis disclosed that there was a liquidity issue at
23 Vivendi sometime in the middle of 2002, correct?

24 MR. CAPPUCCI: Objection to form.

25 A. I believe so.

1 THE COURT: Wait a minute. What does it mean,
2 objection to form?

3 MR. CAPPUCCI: Your Honor, I don't know what the
4 foundation is.

5 THE COURT: He is asking him. If he doesn't know, he
6 will say "I don't know," and then we will realize there is no
7 foundation. If he knows, he will answer. What did you answer?

8 A. Can you repeat the question? I said I don't recall.

9 Q. Did you ever conclude that Vivendi had a liquidity issue?

10 A. I believe so, yes.

11 Q. Do you recall when that occurred?

12 A. No, I don't.

13 Q. Was it in 2002?

14 A. Yes.

15 Q. Early part of 2002?

16 A. I don't know. I don't recall.

17 Q. After that liquidity issue occurred, whenever it occurred,
18 did that change your recommendation with respect to Vivendi
19 stock?

20 A. I don't recall.

21 Q. Did it change your recommendation from buy or hold to sell?

22 A. Not that I recall.

23 Q. Did you ever recommend that Vivendi stock be sold?

24 A. Not that I recall.

25 Q. Did Mr. Gabelli, Mario Gabelli, ever disagree with the

private market value number that you came up with for Vivendi during the relevant period?

A. I don't recall.

Q. You don't recall?

A. I don't recall.

Q. Do you recall that your deposition was taken in this case?

A. I recall the deposition.

Q. Were you under oath at the time?

A. I was.

Q. Do you recall being asked this question and being given this answer?

"Q. Do you remember Mario Gabelli disagreeing with the private market value number that you came up with for Vivendi during the relevant period?

"A. No."

Was that correct?

A. I believe so.

Q. Is it correct, sir, that at Gabelli -- by "Gabelli" I mean the various entities at Gabelli -- is it correct that the larger the difference between the public market price on the one hand and the private market value on the other hand, the more likely it is that Gabelli would buy if the private market value was higher? Correct?

A. Yes. All other things equal, yes.

Q. I asked you a moment ago about a liquidity issue or

1 liquidity crisis that Vivendi experienced in 2002.

2 A. Yes.

3 Q. Do you recall that?

4 A. Yes.

5 Q. How did that supposed liquidity crisis impact your PMV
6 calculation for Vivendi?

7 A. I don't believe it did.

8 Q. You don't think it did?

9 A. No.

10 Q. I take it that if it did not affect your PMV calculation, a
11 liquidity crisis would similarly not affect your buy, sell, or
12 hold recommendation, correct?

13 A. No, not necessarily. The big driver, I see PMV. But the
14 discount to the PMV between the market price and the PMV is a
15 key factor. If there is a liquidity crisis or some type of
16 event like that, you would expect the discount to widen. I
17 mean you would expect the stock to go down.

18 Q. You would expect the public market price to go down?

19 A. Yes. You wouldn't want to buy it in front of that -- if
20 you thought it was going to go down, you would wait to buy it
21 or buy more or recommend to buy more at that point.

22 Q. But every time the public market price goes down, that
23 increases the difference between the public market price and
24 the private market value, correct?

25 A. The discount. It increases the discount.

1 Q. The discount?

2 A. Yes.

3 Q. Between the two. It does not affect the private market
4 value analysis at all, according to you, correct?

5 A. No.

6 Q. According to your recollection, sir, is it correct that
7 throughout the entire relevant period, the private market value
8 that you calculated for Vivendi was always above the public
9 market stock price?

10 A. I believe so.

11 Q. With respect to Mario Gabelli, is he a short-term or long-
12 term investor?

13 A. It is my understanding he was a long-term investor.

14 Q. What does that mean?

15 A. He's not focused on near-term trading. He's more focused
16 on buy and hold and realizing value over time. You would have
17 to ask him. I'm not sure what his -- he didn't communicate his
18 exact time horizon to me as an analyst.

19 Q. At the time that you were analyzing Vivendi, did you have
20 an opinion as to whether or not the liquidity issue that
21 Vivendi was experiencing in 2002 was a short-term or a long-
22 term issue?

23 A. It depends on what your definition of short and long-term
24 is. I believe I thought it was a short-term issue, undefined
25 short term. Something that could be solved within a year or

1 so, I call that short term.

2 Q. Short term. All right, sir. Were you negative on Vivendi
3 in June of 2002?

4 MR. CAPPUCCI: Objection to form. Where does that
5 mean, negative?

6 THE COURT: You didn't recommend selling, did you?

7 THE WITNESS: Not to my knowledge. I don't recall.

8 THE COURT: You don't remember if you recommended
9 buying, either?

10 THE WITNESS: No.

11 MR. SAUNDERS: May I have a moment, your Honor, to
12 check with my colleagues? I think I've come to the end.

13 THE COURT: Sure.

14 MR. SAUNDERS: I have no further questions, your
15 Honor.

16 THE COURT: Thank you.

17 MR. CAPPUCCI: I'll use the 15 minutes, if that's OK.

18 THE COURT: Yes, let's use it.

19 MR. CAPPUCCI: I'm ready to be as productive as
20 possible. I thank you.

21 THE COURT: Good.

22 CROSS-EXAMINATION

23 BY MR. CAPPUCCI:

24 Q. May we please pull up Defendants' Exhibit AU.

25 A. Same book?

1 THE COURT: Yes.

2 Q. Yes, if it's in your book, Mr. Rittenberry, thank you. Mr.
3 Saunders put this exhibit in front of you. I'd like you to
4 turn your attention to again what is called the box, and the
5 bottom line of the box, which says, "Current market discount to
6 PMV." Do you see that?

7 A. Yes.

8 Q. Obviously, that information, is it not, is projected over a
9 multiyear period, correct?

10 A. Yes.

11 Q. Generally, once again for the record, what is that meant to
12 portray?

13 A. It's the discount between the current publicly traded
14 security price and the private market value estimate by year.

15 Q. I believe you were referring to that in your testimony as
16 the discount or the differential, is that not correct?

17 A. That's the discount, yes.

18 Q. Is that important information for purposes of the
19 presentation of the material on this chart?

20 A. Yes. I think I said obviously the size of the discount is
21 important and whether you think that discount is going to
22 shrink or grow over time.

23 Q. Is it not true that this analysis for that point only at
24 this juncture relies on where the market price is at that time,
25 correct?

1 A. The discount, yes.

2 Q. Right. In order to present the difference between market
3 price and PMV, you have to present what the market price is?

4 A. Correct, yes.

5 Q. Did you assume at all times during the relevant period that
6 the market price was free of inflation?

7 A. Inflation?

8 THE COURT: It was an honest figure, so to speak?

9 A. An honest figure. I did, yes.

10 Q. Did you have any reason to believe at any time during the
11 relevant period that the market price was impacted by false
12 statements by Vivendi's management?

13 A. No.

14 Q. Did you believe the market price had integrity?

15 A. Yes.

16 Q. If the market price was subject to manipulation and/or was
17 inflated as a result of a fraud, would that impact the
18 reliability of the information which is being portrayed here?

19 A. It would affect the reliability of the discount in terms of
20 the market price itself and the numbers themselves are based on
21 publicly available releases from the company that are assumed
22 to be factual.

23 Q. What would you do if you found out during the process of
24 preparing a PMV analysis that the market price was unreliable?

25 A. It would call into question the size of the discount and

1 how big or small I thought that discount would be in the
2 future, I guess is the right way to put it.

3 Q. You testified earlier, Mr. Rittenberry, that your
4 understanding was that the way the PMV worksheet was used, to
5 the extent it was used, would be to look at the differential
6 between where the PMV number was and the market price, correct?

7 A. Yes.

8 Q. If a person was doing that comparison and the market price
9 was inflated, they would be going down the wrong course,
10 correct?

11 A. As it pertains to the discount, yes.

12 THE COURT: I'm not sure I understand that. The
13 market price was inflated. If you took the inflation out, it
14 would be lower and the discount would be even greater, right?

15 THE WITNESS: Yes. I think that's what you are
16 asking.

17 THE COURT: If the price was inflated and you stripped
18 that inflation out, the market value would be even lower and
19 the discount would be bigger, between the private market and
20 the market price, right?

21 THE WITNESS: Yes.

22 Q. In the hypothetical that the Court just gave you where the
23 market price was inflated, the discount would be a greater
24 number, correct?

25 THE COURT: If you took the inflation out.

1 MR. CAPPUCCI: Yes.

2 A. If you took the inflation out, yes.

3 Q. Therefore, under that scenario, someone looking at the
4 chart may believe that the investment is more attractive than
5 it should have been, correct?

6 THE COURT: No, it's the exact opposite. If the
7 inflation was out, market value would be even lower and the
8 discount would be even greater?

9 THE WITNESS: On that basis, yes. If you knew there
10 was inflation, that the numbers were inflated, then that would
11 bring you to a different decision.

12 THE COURT: The market value would be even lower?

13 THE WITNESS: Yes.

14 THE COURT: The private market value would stay the
15 same?

16 THE WITNESS: Yes.

17 THE COURT: Right.

18 THE WITNESS: If you ignore all other dynamics.

19 THE COURT: That's right. The differential would be
20 even greater?

21 THE WITNESS: Yes.

22 MR. CAPPUCCI: I think we get the point, your Honor.

23 Q. What I'm saying, Mr. Rittenberry, is that the analysis
24 which is reflected on this worksheet of PMV, which is the model
25 that you testified that Gabelli uses to prepare PMV, relies on

1 market price in that respect, correct?

2 A. In that respect, yes.

3 Q. It assumes that the market price is free of artificial
4 inflation, correct?

5 A. Yes.

6 Q. Similarly, on the top left section of the document, it
7 reports the 52-week trading range of the stock. Do you see
8 that?

9 A. Yes.

10 THE COURT: Where is that?

11 MR. CAPPUCCI: Top left-hand, about an inch or two
12 down. It reads "52-week trading."

13 THE COURT: Thank you.

14 Q. Why is that information being reflected on a PMV chart?

15 A. Just so you can reference where the stock has traded
16 relevant to what you think the private market value is.

17 THE COURT: So you can calculate the discount, right?

18 THE WITNESS: You can think kind of the highest and
19 lowest point, how big the discount was over the course of the
20 year.

21 THE COURT: Exactly. How big or small the discount
22 was or the differential between PMV and market value?

23 THE WITNESS: Yes.

24 Q. Similarly, if that information was being manipulated, it
25 would impact the reliability of the comparison, correct?

1 A. Of the discount, yes.

2 Q. Now, let's again use Mr. Saunders' chart, Exhibit AU, which
3 has been identified as the January '01 PMV.

4 THE COURT: Wait. I want to make sure I'm at the same
5 document.

6 MR. CAPPUCCI: Same document. I was going to use
7 another one, your Honor, but I might as well use this one
8 because it's easier for all of us.

9 THE COURT: I see. It's just it was confusing when
10 you called it Mr. Saunders' document.

11 MR. CAPPUCCI: Defendants' Exhibit AU.

12 THE COURT: Could you slow down a minute? When I'm
13 talking, could you pause?

14 MR. CAPPUCCI: I'm sorry.

15 THE COURT: This is a Vivendi document, right?

16 THE WITNESS: Yes, that I created.

17 THE COURT: It's a GAMCO document?

18 THE WITNESS: Yes.

19 THE COURT: That you created?

20 THE WITNESS: Yes.

21 THE COURT: Thank you. Go ahead.

22 BY MR. CAPPUCCI:

23 Q. Do you see where it says 2001 P? Those were your
24 projections for 2001, correct, that column?

25 A. Yes.

1 MR. CAPPUCCI: Your Honor, are you with me?

2 THE COURT: I am.

3 Q. If I'm correct, the box reflects varying segments of
4 Vivendi's businesses and projections which are applied to
5 revenues and earnings for each segment, correct?

6 A. Yes.

7 Q. Those multiples that you are using to compute enterprise
8 value for those segments, do they assume that there is a
9 willing industrialist who was ready to buy at the time this PMV
10 worksheet is calculated?

11 A. Yes.

12 Q. Was there a willing industrialist ready to buy these
13 segments at any time during the relevant period, to your
14 knowledge?

15 A. No.

16 Q. In that respect, the multiples that you used, although they
17 were based on judgment, were speculative, correct?

18 A. Correct.

19 Q. They were hypothetical, correct?

20 A. Yes.

21 Q. What was the likelihood in any given year during the
22 relevant period that Vivendi, in your opinion, would hit the
23 private market value?

24 A. A low likelihood.

25 Q. Explain that to the Court.

A. Essentially, the private market value is where the company would trade if it was sold kind of in a perfect world and you had an industrial buyer for each one of the assets, including a control premium, etc. Typically, stocks do not trade with a control premium embedded. It's fairly rare for a company to trade at its private market value unless there is speculation that the company is going to be sold or there is some other dynamic driving the stock price.

Q. Once again, was there any speculation in the marketplace during the relevant period that Vivendi was going to be, for example, a takeover candidate?

A. Not that I recall.

MR. CAPPUCCI: Your Honor, I would like to move to Defendants' Exhibit AS, which is a June 25, 2003 analyst report.

THE COURT: Is that in the book? Is AS in the book?

MR. CAPPUCCI: No, your Honor, it is not in the book.

THE COURT: It is, AS.

A. It is, yes.

THE COURT: We all have AS.

Q. Mr. Rittenberry, do you have the document in front of you?

A. Yes.

Q. Can you please quickly look at it for us.

A. Yes.

Q. I'm going to ask you to identify it.

1 A. This is a published recommendation that I wrote up to
2 purchase Vivendi securities that we sent to our internal and
3 external clients in 2003. This was my buy thesis on the stock
4 at that point.

5 Q. This is in 2003, well after the relevant period?

6 A. Yes.

7 Q. Turn to the last page, please. Do you see where it says
8 One Corporate Center, the address of the firm, on the last
9 page?

10 A. Yes, sir.

11 Q. Is that section referred to as a legend?

12 A. I don't know.

13 Q. Is this print something that would have been found on all
14 Gabelli analyst reports?

15 A. Yes.

16 Q. During the relevant period?

17 A. Yes.

18 Q. There is a section that discusses PMV. I want to read that
19 to you.

20 A. OK.

21 THE COURT: Is that the sentence that starts with "We
22 do refer"?

23 MR. CAPPUCCI: Yes. Your Honor, you're head of me.

24 THE COURT: I was afraid you read too fast, so I was
25 going to read it.

1 MR. CAPPUCCI: I'm sorry, your Honor.

2 Q. "We do refer to private market value, or PMV, which is the
3 price that we believe an informed buyer would pay, would pay,
4 to acquire 100 percent of a company. There is no assurance
5 that there are any willing buyers of a company at this price,
6 and we do not intend to suggest that any acquisition is
7 likely."

8 Can you please explain that last sentence with respect
9 to the fact that you are giving --

10 THE COURT: I actually won't allow him to. I
11 understand it. It's in plain English. I don't need him to
12 tell me what it means.

13 MR. CAPPUCCI: Thank you, your Honor.

14 Q. Did you believe that to be correct during the relevant
15 period?

16 A. Yes.

17 Q. Did you believe that there were no willing buyers of
18 Vivendi at the PMV values?

19 A. Yes.

20 Q. Further on this page, Mr. Rittenberry, there is a section
21 that is entitled "Management." If you would look at the
22 triangle, the famous diamond.

23 A. Yes.

24 Q. What is reflected in this chart? What is depicted?

25 A. This is just a schematic of the Gabelli investment process.

1 It researches the foundation. Private market value determined
2 by cash flow and management is at the top of whatever this
3 thing is, diamond or pyramid or something.

4 Q. What is your understanding of the reference to the term
5 "management" there?

6 A. Essentially, that management is going to help unlock value
7 managing the company for investors.

8 THE COURT: We have to stop now and reconvene at 2
9 o'clock for the luncheon recess. 2 o'clock sharp.

10 MR. CAPPUCCI: Yes, your Honor.

11 THE COURT: Thank you.

12 (Luncheon recess)

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AFTERNOON SESSION

2:00 p.m.

ANDREW RITTENBERRY, resumed.

THE COURT: Mr. Cappucci.

MR. CAPPUCCI: Thank you, your Honor.

CROSS-EXAMINATION (continued)

BY MR. CAPPUCCI:

Q. Perhaps to reflect quickly on what we covered before the break, Mr. Rittenberry, will you once again pull out what has been marked Defendants' Exhibit AS. This is the June 25, 2003 --

THE COURT: You don't want to repeat what you already did, did you?

MR. CAPPUCCI: No. I want to get him back on the subject, your Honor.

THE COURT: But don't repeat.

MR. CAPPUCCI: I'm not going to repeat.

THE COURT: It is nonjury. I remember where we were.

Q. Mr. Rittenberry, you recall I asked you a question about the private market value and the legend in the analyst report?

A. Yes.

Q. It's reference to the fact that this was a price that the firm believed an informed buyer would pay, would pay, to acquire 100 percent of the business. OK?

A. Yes.

1 Q. That's correct, right?

2 A. Yes.

3 Q. When would that value be recognized by Vivendi? Your
4 private market valuation applies, does it not, multiples to a
5 business segment?

6 A. Yes.

7 Q. That's a number, and it kicks out a number for a segment
8 that you think an industrialist would pay, correct?

9 A. Correct.

10 Q. When does that value appear on Vivendi's balance sheet?
11 When does it occur?

12 A. In the stock price you're saying?

13 Q. No. When does the event that you are projecting occur?

14 A. In the hypothetical?

15 Q. Yes.

16 A. Sale of the company.

17 Q. A sale of a company or perhaps the sale of a division?

18 A. Yes.

19 Q. In that sense is the value yet to be unlocked?

20 A. Correct, yes.

21 Q. Does this analysis, in effect, point to value which you
22 believe exists but will occur and manifest itself at some later
23 point in time?

24 A. Correct, yes.

25 Q. Isn't that why you said that the PMV for a given year, it

1 was unlikely, if not impossible, that the PMV in any one year
2 would be realized, correct?

3 A. Yes.

4 Q. For that to happen, all of those segments would have to be
5 monetized?

6 A. Correct.

7 Q. It would have to be --

8 THE COURT: Are you testifying?

9 MR. CAPPUCCI: No, I'm asking.

10 THE COURT: No, you're testifying. Please. I got the
11 point before lunch.

12 MR. CAPPUCCI: OK.

13 Q. That's correct, do you understand what I'm saying, Mr.
14 Rittenberry?

15 A. Yes.

16 Q. Once again, to quickly touch on that as you understand it,
17 Mr. Rittenberry, if you believed that Vivendi during the
18 relevant period was making false statements into the
19 marketplace, it was lying about its businesses publicly, would
20 you continue to have a buy recommendation on the stock?

21 A. No, probably not.

22 Q. Would you recommend to Mr. Gabelli or anyone else at GAMCO
23 to buy Vivendi's stock if you believed the stock price was
24 artificially inflated?

25 A. Probably not, no.

1 Q. I don't think he would be too happy if you did, correct?

2 A. Correct.

3 THE COURT: If you move to strike the last question
4 and answer, I'll grant that, Mr. Saunders.

5 MR. SAUNDERS: So moved, your Honor.

6 THE COURT: Granted.

7 Q. Mr. Saunders asked you questions about the multiples about
8 the PMV analysis and also talked to you a bit about the
9 liquidity crisis at Vivendi. My question to you is, would it
10 be not true that if there was a liquidity crisis -- withdrawn.
11 If Vivendi was required to sell assets, to sell its assets, in
12 a compressed period of time, would that impact the multiples
13 that could be expected on the sale of a particular business or
14 division of the company?

15 A. Yes.

16 Q. If Vivendi was headed towards a liquidity crisis and had to
17 sell assets, would that affect the utility of the PMV model?

18 A. Yes.

19 Q. Why? Please explain that to the Court.

20 A. The PMV assumes a hypothetical scenario where an acquirer
21 pays a full multiple for the business. If you are in a
22 compressed time period where you have to have a fire sale, you
23 might not be able to realize that ultimate value that you think
24 you would in a normal environment, because it has to be
25 compressed. It's a fire sale by definition.

Q. Do you recall statements by Vivendi at the close of this period where it discussed its necessity of selling assets in a very short period of time?

A. No.

Q. August of 2002, does that refresh your recollection?

A. Not specific statements. I remember the general issue in the time period.

Q. If Vivendi had to sell \$10 billion in assets in less than a year, would that be a compressed timetable?

A. Yes.

Q. Would that impair the company from reaching the PMV multiples that perhaps were in your model had you not known of any such forced sales?

A. Yes.

Q. Your multiples would have been larger, correct?

A. Smaller.

Q. Your multiples would have been smaller?

A. Smaller, yes.

Q. With your multiples having been smaller, the PMV price, the correct price value that you would have come up with would have been a lower price, correct?

A. Yes.

Q. Mr. Rittenberry, you were asked questions about various I think it was two in-person meetings with management during the relevant period. My question to you is, were those meetings

1 typical, in your opinion?

2 A. I believe, so yes.

3 THE COURT: I'm sorry. Typical of what?

4 THE WITNESS: Typical of an institutional investor
5 meeting with a management team.

6 Q. Did you believe that during the relevant period you had any
7 special access to Vivendi management?

8 A. No.

9 Q. One of the documents that Mr. Saunders showed you was an
10 email that you had with the chief financial officer. Do you
11 recall that?

12 A. Yes.

13 Q. Was it typical for an analyst to be communicating by email
14 with a chief financial officer?

15 A. Yes.

16 Q. Isn't that what companies do all the time?

17 A. Yes.

18 Q. To try to provide that access?

19 A. Yes.

20 Q. Mr. Rittenberry, once again for the record, did you
21 participate in any decision to purchase or sell Vivendi
22 securities during the relevant period?

23 A. I did not.

24 Q. Do you know, do you have actual knowledge as to whether
25 anyone at the Gabelli firm who purchased or sold Vivendi

securities specifically relied on any PMV analysis?

A. No, no direct knowledge.

MR. CAPPUCCI: No further questions, your Honor.

THE COURT: Anything further, Mr. Saunders?

REDIRECT EXAMINATION

BY MR. SAUNDERS:

Q. Mr. Rittenberry, Mr. Cappucci asked you about the private market value and what the likelihood was in any given year during the relevant period that Vivendi would hit the private market value. Do you recall that question?

A. Yes.

Q. Your answer was, as I recorded it, a low likelihood?

A. Yes.

Q. Then you went on to explain that?

A. Yes.

Q. First of all, he limited his question to the period during the relevant period, right?

A. OK, yes.

Q. He didn't ask you about what would happen after the end of the relevant period, that is, after August of 2002, right?

A. Yes.

Q. In making your buy, sell, or hold recommendations, you took into account, did you not, not only the private market value and the discount between the private market value and the public market price, you also took into account whether a

1 catalyst might be found that would surface, or unrock, the
2 value that you believe was the difference between the public
3 market price and the private market value, right?

4 A. Correct.

5 Q. That catalyst was not limited to whether somebody would
6 come along and buy the entire company, was it?

7 A. Right, no.

8 Q. It could have been anything else that in your professional
9 judgment might have unlocked the value and caused the public
10 market price to go up?

11 A. Correct.

12 Q. Your period that you were looking at was a 2-year period,
13 right?

14 A. The model is over a 5-year period, the multiyear period.
15 It wasn't specifically a 2-year period.

16 Q. It certainly wasn't limited to the relevant period that we
17 have defined in this case?

18 A. No, correct.

19 Q. If you look at Defendants' Exhibit N. In particular, you
20 looked at this before, page 0047.

21 A. Correct.

22 (Continued on next page)

1 BY MR. SAUNDERS:

2 Q. In describing the investment process, this document, which
3 was shown to the Gabelli shareholders, says that --

4 A. Investors. It was shown to our investors.

5 Q. I'm sorry. To investors, yes.

6 The purpose was to select stocks with two-year 50
7 percent return potential, correct?

8 A. Correct.

9 Q. It doesn't say select stocks that have a low likelihood of
10 reaching the private market value, does it?

11 A. No.

12 Q. If you had gone to Mr. Gabelli and said, Mr. Gabelli, I
13 think we ought to buy this stock because I think there's a low
14 likelihood that this stock will ever reach the private market
15 value, what would he have said to you?

16 A. I don't know.

17 Q. He would have said, I'm not buying it?

18 MR. CAPPUCCI: Objection.

19 Q. Right?

20 THE COURT: Sustained.

21 Q. Don't you know that, sir?

22 MR. CAPPUCCI: Objection.

23 THE COURT: I sustained the objection.

24 A. You can ask him tomorrow.

25 Q. All right. You certainly didn't recommend, I take it, any

1 stocks that Gabelli ought to buy that had a low likelihood of
2 reaching the private market value, did you?

3 A. I -- I'd like to say one thing. Stocks very rarely trade
4 at the private market value. I think I said that earlier.
5 It's a question of the discount. And the -- the shares, you
6 know, if they traded at 10 percent discount to private market
7 value and, you know, you -- you wouldn't buy them for that
8 10 percent gain until this point about the 50 percent return
9 over two years.

10 But the discount is the key, the key variable in
11 there. And as I said before, stocks rarely trade at above
12 private market value. And, you know, when they're within the
13 vicinity of private market value, I would consider that, you
14 know, good enough, whether I would make a recommendation or
15 not.

16 Q. I'm sorry. Let me sort of deconstruct that. You say
17 stocks rarely trade at the private market value?

18 A. Yes.

19 Q. Your buy recommendation was based upon the fact, was it
20 not, that the stocks you were recommending were not trading at
21 their private market value?

22 A. That's correct.

23 Q. Right, that they were trading below --

24 A. There was never the assumption that it would ever trade at
25 the private market value, just that it's a large discount to

1 private market value, and at some point that discount is going
2 to narrow it towards private market value. It very rarely
3 actually gets to private market value or exceeds private market
4 value.

5 Q. Right. And --

6 A. That was my point. Sorry it was convoluted.

7 Q. So is that what the 50 percent return means on this page?

8 A. Yes. Yes.

9 Q. All right. So, you may not hit the private market value
10 exactly, but you would recommend stocks that you thought --

11 A. Yeah.

12 Q. -- had a high likelihood of a 50 percent return within two
13 years?

14 A. Yes.

15 Q. Correct?

16 A. Yes.

17 Q. By 50 percent return, I mean --

18 A. Yes.

19 Q. -- 50 percent higher than the existing public --

20 A. That doesn't necessarily mean it's going to trade at the
21 private market value, but you expect the 50 percent
22 appreciation over the time period.

23 Q. Appreciation in the public market price?

24 A. Yes, correct. Yes.

25 Q. All right. Just one last question. You said that, in

1 response to one of Mr. Cappucci's questions, that if you
2 believe that Vivendi issued misleading statements, you would
3 not have recommended that Gabelli buy the stock. Do you recall
4 that?

5 A. Yes.

6 Q. Did I get that right?

7 A. I think so. I'm not sure.

8 Q. Now, you told us in your deposition that you had formed the
9 conclusion during 2002 that Vivendi had, in fact, issued
10 misleading statements. Do you recall that?

11 A. Yes. I mean, I think they did -- I think that was admitted
12 by the company, correct. I mean --

13 Q. All right. Let me just be sure. You formed the conclusion
14 in 2002 that Vivendi had, in fact, issued misleading
15 statements, correct?

16 A. Yes.

17 Q. And you told us in the deposition -- I'm asking you now
18 whether it's still your testimony -- that notwithstanding that
19 conclusion, you nevertheless continued to recommend that
20 Gabelli buy the Vivendi stock, correct?

21 A. I think I said buy or hold. I can't remember what my exact
22 testimony was.

23 Q. I think -- well, did that fact affect your recommendation
24 in any way?

25 A. Well, it just affects it in the mindset of the discount.

And if you think there's a misleading statement, you -- I think it's natural to think, as an analyst, that that discount might get wider as that information comes to light in the marketplace.

Q. It didn't cause you to change your recommendation, did it?

A. Not -- I don't recall. I don't recall. Not to my knowledge, but I don't recall what I -- what my exact sentences were at the deposition.

Q. But to your knowledge, to your best recollection, it did not cause you to change your recommendation?

A. I don't think so but I don't know. There was -- there were verbal recommendations, so there was no -- we didn't keep records of them, unfortunately. Go back and look when I said what. It's all from memory. So I don't recall that I did.

Q. In your deposition beginning at page 177, you talk about the misleading statements that you thought Vivendi issued with respect to SFR. I'm happy to put that in front of you.

MR. CAPPUCCI: If he's going to ask him questions about his transcript --

MR. SAUNDERS: I'm happy to put that in front of the --

THE COURT: That's fair. If he can't represent he --

MR. CAPPUCCI: He's citing pages.

THE COURT: Once he said he can't remember, you want to refresh his recollection. Do you want to show him the page?

1 MR. SAUNDERS: Yes.

2 MR. CAPPUCCI: What page, Paul?

3 MR. SAUNDERS: The colloquy starts on page 177. What
4 I want to ask is on 178.

5 THE WITNESS: Is it in here?

6 MR. SAUNDERS: It's not in that book.

7 THE COURT: He's going to bring it.

8 MR. SAUNDERS: May I approach, your Honor, please.

9 THE COURT: Of course.

10 THE WITNESS: Page 47?

11 MR. SAUNDERS: 177.

12 THE COURT: You said 177?

13 MR. SAUNDERS: 177. The colloquy starts on 177.

14 BY MR. SAUNDERS:

15 Q. And you can read that to refresh your recollection. The
16 question I want to ask you about is on 178.

17 A. Okay. Okay.

18 Q. Do you see on 177 there's a discussion about what you
19 believe was a misleading statement issued by Vivendi?

20 A. Okay.

21 Q. Do you see that, sir?

22 A. Yes.

23 Q. All right. And then on 178 you were asked at line 13:

24 "Q Did you change your investment recommendation based on this
25 understanding that you gained?

1 "A No."

2 A. Okay.

3 Q. Was that testimony correct --

4 A. I think so.

5 Q. -- at the time you gave it?

6 A. Yes.

7 MR. SAUNDERS: Thank you very much. No further
8 questions, your Honor.

9 MR. CAPPUCCI: Your Honor, just one question.

10 THE COURT: All right.

11 RECROSS EXAMINATION

12 BY MR. CAPPUCCI:

13 Q. Mr. Rittenberry, just going from the last time back to
14 Defendant's Exhibit AU, which is the January 11, 2001, PMV
15 worksheet?

16 A. AU you said? AU.

17 Q. What was the price of Vivendi ADRs on the date of this
18 worksheet?

19 A. 70.39.

20 Q. Would you have paid any more for those shares beyond the
21 public market price on that date?

22 A. Excuse me?

23 Q. Would you have recommended to anyone at Gabelli that they
24 pay more than \$70.39 for the Vivendi ADRs on January 11, 2001?

25 MR. SAUNDERS: Your Honor, I'm going to object to that

question.

THE COURT: Sustained.

MR. SAUNDERS: No questions.

THE COURT: Okay. I think we're done,
Mr. Rittenberry, right?

MR. CAMERON: Yes, your Honor.

THE COURT: All done. Thank you.

(Witness excused)

THE COURT: Next witness?

MR. CAMERON: Good afternoon, your Honor. Defendant
calls Mr. Douglas Jamieson as our next witness, your Honor.

THE COURT: Are you going to have an exhibit book on
this witness?

MR. CAMERON: Your Honor, I think I'm going to have a
couple exhibits which I can hand out as we go.

THE COURT: No problem.

DOUGLAS JAMIESON,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CAMERON:

Q. Good afternoon, Mr. Jamieson.

Sir, can you please provide for the Court just a brief
summary of your education and your employment history through
this point.

1 A. Undergraduate Bucknell University, 1977, degree in
2 economics and international relations. Graduate degree,
3 Columbia University School of Business, 1981, finance and
4 international relations -- I mean, finance and accounting.
5 I've worked with Gabelli since 1981.

6 Q. And as I understand it, you are currently the president and
7 chief operating officer on a company called GAMCO Investors,
8 Inc., is that correct?

9 A. Correct.

10 Q. And I think you've held that position since August of 2004,
11 is that right?

12 A. Yes, it is.

13 Q. And GAMCO Investors, Inc. is a publicly traded company on
14 the New York Stock Exchange under the symbol GBL, is that
15 right?

16 A. Yes, it is.

17 Q. And if it's okay with you, Mr. Jamieson, I'll refer to that
18 company as GBL just as we go through this part of the
19 questioning.

20 A. Okay.

21 Q. And GBL is the parent company that oversees the various
22 activities undertaken by the GAMCO group of companies, is that
23 fair?

24 A. Yes.

25 Q. All right. So let me then ask you about some of those

1 subsidiaries.

2 You're aware that one of the plaintiffs in this action
3 is a company called GAMCO Investors, Inc., at least that's the
4 name on the caption, is that correct?

5 A. Yes.

6 Q. And I know it's a little confusing, but that company is not
7 the same company as GBL, which is the company that we just
8 spoke about, right?

9 A. Correct.

10 Q. And that's because the company that was formerly known as
11 GAMCO Investors, Inc. was renamed GAMCO Asset Management in
12 September 2005, correct?

13 A. Correct.

14 Q. But throughout the relevant period -- and you understand
15 the relevant period here to be October 30th of 2000 through
16 August 14 of 2002 -- it was called GAMCO Investors, Inc.,
17 right?

18 A. Yes.

19 Q. And again, just so it's clear in the questions that follow,
20 I'll refer to that as GAMCO, if that's all right.

21 A. Yes.

22 Q. And you've been chief operating officer of that company
23 since 1999, is that correct?

24 A. Yes, it is.

25 Q. And you continue in that position today, sir?

1 A. Yes.

2 Q. And again, throughout the relevant period GAMCO was a
3 wholly-owned subsidiary of GBL, correct?

4 A. Correct.

5 Q. Now, is it fair to describe GAMCO, one of the plaintiffs in
6 this case, as a registered investment adviser providing
7 investment advice to a broad array of clients?

8 A. Yes.

9 Q. And that, again, was the case throughout the relevant
10 period?

11 A. Yes.

12 Q. And those clients include pension funds, endowments,
13 foundations, high net worth individuals and subadvised clients,
14 is that right?

15 A. Yes.

16 Q. Can you explain what a subadvised client is, sir?

17 A. That's an institution that retains GAMCO to manage assets
18 that they are gathering.

19 Q. And so in terms of the services that GAMCO provides to its
20 clients, is it fair to say that GAMCO manages its clients'
21 accounts and has discretion to invest its funds, its clients'
22 funds in, for example, equity securities, right?

23 A. Yes.

24 Q. And GAMCO also talks to its clients about the markets from
25 time to time, is that fair?

1 A. Yes.

2 Q. And I think throughout the relevant period GAMCO had
3 approximately 150 to 200 employees, right?

4 A. Yes.

5 Q. And it's your understanding that GAMCO is a plaintiff here
6 today suing Vivendi to recover losses incurred by its clients
7 as a result of its trading in Vivendi ADRs during the relevant
8 period, correct?

9 A. Yes.

10 Q. All right. Let me ask you about a separate company called
11 Gabelli Funds, LLC. That's also a wholly-owned subsidiary of
12 GBL, correct?

13 A. Yes.

14 Q. And is it fair to say that during the relevant period
15 Gabelli Funds managed the proprietary mutual fund products of
16 GBL?

17 A. That is correct.

18 Q. And you're aware that some of those mutual funds managed by
19 Gabelli Funds, LLC are also plaintiffs in this litigation,
20 correct?

21 A. Correct.

22 Q. And just so the record is clear, that includes GAMCO Global
23 Series Funds, Inc., is that correct?

24 A. Yes.

25 Q. Gabelli Capital Asset Fund?

1 A. Yes.

2 Q. The Gabelli Value Fund, Inc.?

3 A. Yes.

4 Q. The Gabelli Asset Fund?

5 A. Yes.

6 Q. The Gabelli Global Multimedia Trust, Inc.?

7 A. Yes.

8 Q. And the Gabelli Equity Trust, Inc.?

9 A. Yes.

10 Q. And again, just for the ease of reference, as my questions
11 proceed, I'm going to refer to those entities as the mutual
12 fund plaintiffs, if that's okay.

13 A. Okay.

14 Q. Now, and by the way, it's fair to say that all of the GAMCO
15 plaintiffs, GAMCO and those mutual fund plaintiffs, were value
16 styled investors throughout the relevant period, correct?

17 A. Correct.

18 Q. Can you explain what that means.

19 A. That the investment advisers are buying companies in the
20 public market that they believe are trading at a significant
21 discount to their intrinsic value.

22 Q. And the intrinsic value from the perspective of GAMCO and
23 the mutual fund plaintiffs is represented by their calculation
24 of private market value, correct?

25 A. Correct.

Q. And you're aware that those mutual fund plaintiffs are also suing Vivendi here today to recover losses that they incurred by trading Vivendi ADRs during the relevant period, correct?

A. Yes.

Q. And Mr. Albert, who's going to be called next by the defendants and who is sitting at the plaintiff's table, is currently the chief operating officer and executive vice president of Gabelli Funds, LLC at the moment, correct?

A. Correct.

Q. All right. The last company I have to ask you about is one called Gabelli & Company, Inc. That's also a subsidiary of GBL, correct?

A. Yes. Indirectly, but, yes.

Q. To be more precise, an indirect subsidiary, I believe, is a company called Gabelli Securities, Inc. interposed in the middle?

A. Yes.

Q. And is it fair to describe Gabelli & Company as the research arm of GBL?

A. Institution research services, yes.

Q. So throughout the relevant period Gabelli & Company, or the analysts employed by Gabelli & Company, conducted research for GAMCO, is that correct?

A. They conducted research for Gabelli & Company. GAMCO may or may not use their research.

1 Q. Well, does Gabelli & Company perform research for GAMCO?

2 A. It provides institutional research services for
3 institutions, one of which is GAMCO, yes.

4 Q. And so what that means is they did the research for the
5 portfolio managers who make the decisions about which equity
6 securities to buy on behalf of GAMCO's clients, is that
7 correct?

8 MR. CAPPUCCI: Objection to form.

9 THE COURT: And what's --

10 MR. CAPPUCCI: Lacks foundation.

11 THE COURT: It's a strange question. Either he has
12 that knowledge or he doesn't. If he does, then there's
13 foundation by definition.

14 Do you know the answer to that question?

15 THE WITNESS: Would -- they do provide research
16 services to GAMCO, yes.

17 THE COURT: How do you know that?

18 THE WITNESS: I'm part -- I know that they do.

19 THE COURT: How? From your position there?

20 THE WITNESS: From position there, yes.

21 BY MR. CAMERON:

22 Q. Just to elaborate on that point, Gabelli & Company analysts
23 like Mr. Rittenberry -- and you're aware Mr. Rittenberry was an
24 analyst employed by Gabelli & Company during the relevant
25 period, is that correct?

1 A. Yes.

2 Q. And, in fact, that he was the analyst responsible for
3 researching companies, including specifically Vivendi, during
4 that period, correct?

5 A. Correct.

6 Q. And analysts like Mr. Rittenberry reported their research
7 at daily morning meetings during the relevant period, correct?

8 A. Yes.

9 Q. And you attended those morning meetings yourself, correct?

10 A. Telephonically, yes.

11 Q. And GAMCO portfolio managers also attended those meetings,
12 correct?

13 A. Yes.

14 Q. And those are the portfolio managers who were making
15 decisions on behalf of GAMCO about which equity securities to
16 purchase on behalf of GAMCO's clients, is that fair?

17 A. Yes.

18 Q. Now, that also -- it's also the case that Gabelli & Company
19 were performing research for the various mutual fund plaintiffs
20 here, correct?

21 A. Yes.

22 Q. And that also includes Gabelli Funds, LLC and the other
23 mutual fund plaintiffs that I had listed before, correct?

24 A. Yes.

25 Q. Now -- and I think you answered this question a short while

1 ago -- would it be fair to say, Mr. Jamieson, that throughout
2 the relevant period the investment strategy pursued both by
3 GAMCO and the mutual fund plaintiffs involved purchasing
4 securities that they determined to be undervalued?

5 A. Yes.

6 Q. And undervalued in this context means that the public stock
7 price of a company was trading below its intrinsic value,
8 correct?

9 A. Yes.

10 Q. And that intrinsic value was represented by GAMCO's
11 calculation of that company's private market value, right?

12 A. Yes.

13 MR. CAMERON: Your Honor, permission to approach the
14 witness?

15 Q. Mr. Jamieson, I'm showing you a document that's been marked
16 as Defendant's Exhibit BE. And do you recognize what this is,
17 sir?

18 A. Yes.

19 Q. Can you explain.

20 A. It looks like a caption of the GAMCO website.

21 Q. And if you look at the bottom right-hand corner, you'll see
22 a date on the date of the printout, and that's December 27,
23 2012. Do you see that?

24 A. Yes, I do.

25 Q. And I want to direct your attention to -- well, first, the

1 name of the company on the top left-hand corner, GAMCO
2 Investors, Inc. Do you see that?

3 A. Yes, I do.

4 Q. And that, I believe, is the company that you are the
5 president and COO of, is that right?

6 A. Yes, it is.

7 Q. You're familiar with this website?

8 A. Yes, I am.

9 Q. And I want to ask you about the heading halfway down in the
10 text that says our philosophy. Do you see that?

11 A. Yes, I do.

12 Q. And it reads, GAMCO Investors, Inc. is best known for its
13 research driven, value oriented equity investing expertise,
14 which is based on the principles of Graham and Dodd. That is
15 investing in undervalued companies that have a high probability
16 of achieving their intrinsic or private value over time.

17 Did I read that correctly?

18 A. Yes.

19 Q. Is that a fair or correct statement of GAMCO's philosophy,
20 sir?

21 A. That's a fair statement.

22 Q. Has that philosophy changed at any point since the relevant
23 period in this case?

24 A. No.

25 MR. CAMERON: Your Honor, we would move the admission

of Exhibit DBE.

MR. CAPPUCCI: No objection.

THE COURT: Exhibit BE is received.

(Defendant's Exhibit BE received in evidence)

BY MR. CAMERON:

Q. And, Mr. Jamieson, during the relevant period, and even today, you're aware that the analysts who are conducting research both for GAMCO and the mutual fund plaintiffs calculated what they viewed as the intrinsic value of the security by using a PMV analysis of the kind Mr. Rittenberry spoke about, right?

A. Yes.

MR. CAMERON: Your Honor, permission to approach?

THE COURT: You don't need to ask any longer.

MR. CAMERON: I'm sorry, your Honor?

THE COURT: You don't need to ask that, any of the lawyers. Thanks.

BY MR. CAMERON:

Q. Mr. Jamieson, I'm showing you a document that's been marked as Defendant's Exhibit J, and I believe that this is already in evidence. Have you seen this before, sir?

A. Yes.

Q. And, in fact, I believe this is what is described as GAMCO's all product book. Is that fair?

A. Yes.

1 Q. And if you look at the page that has a Bates stamp on it of
2 006. Do you have that, sir? It's the little typed numbers on
3 the side of the document.

4 A. Yes.

5 Q. You'll see a page that identifies senior executives, but in
6 the bottom hand corner underneath Gabelli Asset Management
7 Company, there's a date, isn't there?

8 A. Yes, there is.

9 Q. And that suggests the document is dated March 31, 2001,
10 correct?

11 A. Correct.

12 Q. Can you explain the purpose of this all product book, sir?

13 A. It's a pitch book that's used for -- by the marketing team
14 when they go and speak to institutional institutions or
15 consultants.

16 Q. So is it fair to say that the purpose of this document is
17 to explain to a potential investor a little bit about GAMCO?

18 A. Yes.

19 Q. And also about its personnel?

20 A. Yes.

21 Q. And also about its investment philosophy?

22 A. Yes.

23 Q. And also its investment methodology?

24 A. Yes.

25 Q. And has anything about any of those aspects of GAMCO's

1 business changed since the relevant period, sir?

2 A. No.

3 Q. And indeed, if we continue looking at page 6 with a list of
4 senior executives, you are listed second down on the right-hand
5 side of that page, correct?

6 A. Yes.

7 Q. Now, can you turn to page 11, please. Do you have that
8 document, sir?

9 A. Yes, I do.

10 Q. And the heading is value. And underneath, philosophy. And
11 it says, in the tradition of Graham and Dodd, Gabelli Asset
12 Management employs fundamental research to identify companies
13 of dominant industry positions that are selling at substantial
14 discounts to their intrinsic private market values.

15 Did I read that correctly, sir?

16 A. Yes, you did.

17 Q. And is it fair to say that what that is referring to is
18 companies where the public stock price is at a substantial
19 discount to their intrinsic private market values as calculated
20 by Gabelli?

21 A. Yes.

22 Q. And, in fact, it's the case that from Gabelli's
23 perspective, the true value of these companies is what is
24 represented by the private market value, correct?

25 MR. CAPPUCCI: Objection to form.

1 THE COURT: Overruled.

2 Is that your understanding?

3 THE WITNESS: Yes.

4 Q. And not the public stock price in the market, correct?

5 A. The ultimate value is a private market value. The price is
6 where you can buy and sell a security on any given day.

7 Q. Right. So the price in the stock market is simply if you
8 like the price to obtain the security but its value is what is
9 represented by the private market value calculation, correct?

10 A. Yes.

11 Q. It's also the case that throughout the relevant period the
12 only evaluation metric used by GAMCO and the mutual fund
13 plaintiffs was this private market value analysis, correct?

14 A. Well, we did use the earnings per share and the cash flow
15 in addition to the private market value. It was a three-prong
16 metric.

17 Q. And so is it fair to say that the decisions that were made
18 by GAMCO and the mutual fund plaintiffs to purchase Vivendi
19 ADRs during the period was based upon this private market value
20 analysis, supplemented by earnings per share, I think you said,
21 and not because you felt that the stock market price was an
22 accurate measure of the intrinsic value of those securities?

23 A. Yes.

24 Q. Now, the private value metric that was employed by GAMCO in
25 the Gabelli funds during the period is a proprietary metric, is

1 that correct?

2 A. Yes, it is.

3 Q. It's proprietary to GAMCO?

4 A. Yes, it is.

5 Q. And it's proprietary in part because it was GAMCO and Mario
6 Gabelli who developed its use in the analysis of public
7 securities, correct?

8 A. Yes.

9 Q. And another reason why it's proprietary is because GAMCO's
10 own process includes a special and secret ingredient that goes
11 into calculating the final private market value, correct?

12 A. Yes.

13 Q. And that secret or proprietary agreement is part of all
14 evaluations done by GAMCO or mutual fund plaintiffs where they
15 are looking to assess the value of a potential investment,
16 right?

17 A. Yes.

18 Q. And it's GAMCO's use of this proprietary ingredient,
19 including with respect to its valuation of Vivendi, that
20 permitted it to do something that the rest of the market was
21 not doing, namely to buy when everyone is selling and to sell
22 when everyone is buying, correct?

23 A. Yes.

24 MR. CAMERON: No further questions, your Honor.

25 THE COURT: Thank you.

1 CROSS EXAMINATION

2 BY MR. CAPPUCCI:

3 Q. Mr. Jamieson, just would you -- if you could please turn
4 back to Defendant's Exhibit J, that same page that my colleague
5 referred you to on page 11 entitled value. I would like to
6 refer you in the philosophy section of the document, it refers
7 to the term intrinsic private market values.

8 What is meant by intrinsic private market values?

9 A. In its simplest terms, it's the price that someone who knew
10 the various industries would be willing to pay for that
11 business.

12 Q. So when -- is it your understanding that at Gabelli, when
13 the term intrinsic value was used, it's meant to reference the
14 intrinsic private market value as opposed to the in -- an
15 intrinsic value on the New York Stock Exchange?

16 A. Yes.

17 Q. Okay. If I call you up today, Mr. Jamieson, and I have an
18 account at GAMCO, and I ask you what my account is worth, how
19 do you value my account?

20 A. Based on the public prices that are on your statement.

21 Q. What about PMV? Let's say I have shares of Apple, and you
22 have a PMV analysis on Apple, and I ask you, Mr. Jamieson, what
23 are my Apple shares today? Do you give me the market price or
24 do you give me the PMV price?

25 A. Market price.

1 Q. Why don't you give me the PMV price?

2 A. Because it's not a price -- it's not a price today. It's a
3 value that could potentially be obtained in the future.

4 Q. What are those shares worth on that day?

5 A. Price.

6 Q. What are those shares valued at on that day?

7 A. The price.

8 MR. CAPPUCCI: No further questions, your Honor.

9 THE COURT: Anything further, Mr. Cameron?

10 MR. CAMERON: No, your Honor. Thank you.

11 THE COURT: Thank you, Mr. Jamieson. All set.

12 (Witness excused)

13 MR. CAMERON: Your Honor, defendant calls as its next
14 witness Mr. Bruce Alpert.

15 BRUCE ALPERT,

16 called as a witness by the Defendant,

17 having been duly sworn, testified as follows:

18 MR. CAMERON: Thank you, your Honor. At this time I
19 do have a witness book, if I may pass that up.

20 DIRECT EXAMINATION

21 BY MR. CAMERON:

22 Q. Good afternoon, sir. Could you state briefly for the Court
23 a summary of your educational background, with experience to
24 the current time.

25 A. I graduated from Rensselaer Polytechnic Institute in 1974

1 with a Bachelor's in Management Science, and at the end of that
2 year, 1974, with a Master's in Business Administration.

3 I joined PriceWaterhouse and spent eight years with
4 them as an auditor, general audit. I moved from there to Smith
5 Barney and was vice president and treasurer of their mutual
6 funds. I left in 1988 -- 1986 to Dean Witter and served two
7 years there. And in 1988 I joined Gabelli funds as the vice
8 president and treasurer of their mutual funds.

9 Q. Now, Mr. Alpert, as I understand it you are currently the
10 chief operating officer and the executive vice president of
11 Gabelli Funds, LLC, correct?

12 A. Yes.

13 Q. And you were here for Mr. Jamieson's examination, and you
14 would agree that Gabelli Funds is the entity that manages the
15 proprietary fund products of the Gabelli group, is that right?

16 A. Yes.

17 Q. And I understand you've been the chief operating officer of
18 Gabelli Funds, LLC since 1998, right?

19 A. Yes, and since 1988 when I joined the firm.

20 Q. Oh, excuse me. And throughout the relevant period, which
21 you understand to be October 30 of 2000 through August 14 of
22 2002, Gabelli Funds, LLC managed the various mutual funds that
23 sued Vivendi as plaintiffs in this litigation?

24 A. Yes.

25 Q. And again, so the record is clear, I apologize for listing

1 them, but those mutual fund plaintiffs are GAMCO Global Series
2 Funds, Inc., correct?

3 A. Yes.

4 Q. Gabelli Capital Asset Fund?

5 A. Yes.

6 Q. The Gabelli Value Fund, Inc.?

7 A. Yes.

8 Q. The Gabelli Asset Fund?

9 A. Yes.

10 Q. The Gabelli Global Multimedia Trust, Inc.?

11 A. Yes.

12 Q. And the Gabelli Equity Trust, Inc.?

13 A. Yes.

14 Q. Now, I also understand that one of those that I mentioned,
15 the first one, GAMCO Global Series Funds, Inc., incorporates
16 four separate fund portfolios, is that right?

17 A. Yes.

18 Q. And three of those four funds are seeking damages against
19 Vivendi in this case today, correct?

20 A. I believe so, yes.

21 Q. And I think those funds are GAMCO Global Telecommunications
22 Fund, GAMCO Global Growth Fund and the GAMCO Global Opportunity
23 Fund, is that correct?

24 A. Yes.

25 Q. And you're also the president and treasurer of each of

1 those plaintiff mutual funds, is that right?

2 A. I'm treasurer -- excuse me. I'm president of all those
3 funds. We have a new treasurer today, and I was probably
4 treasurer then.

5 Q. I think you were a treasurer during the relevant period, is
6 that correct?

7 A. Yes, I think so.

8 Q. And probably more accurately, when your deposition was
9 taken, I think, right?

10 A. Yes.

11 Q. And for ease of reference, as I did with Mr. Jamieson, I'm
12 going to refer to those funds, those seeking damages from
13 Vivendi in this case, as the mutual fund plaintiffs. Is that
14 okay?

15 A. Fine.

16 Q. Now, it's true, is it not, that all of those funds that
17 I've mentioned, the mutual fund plaintiffs in this case, are
18 value styled funds?

19 A. Yes.

20 Q. Can you explain what that is.

21 A. It's an approach to selecting securities that are trading
22 at a significant discount to their private market value.

23 Q. And so is it fair to say that as value styled funds, all of
24 those mutual fund plaintiffs relied upon GAMCO's PMV
25 methodology, the private market value methodology when making

1 their investment decisions?

2 A. Not entirely, but substantially all of the portfolio would
3 be managed that way.

4 Q. Well, I'm talking about these specific --

5 A. We have investments in cash. We also have investments in
6 merger arbitrage situations --

7 Q. I take your point. Let me then narrow the question to
8 refer to the identification and purchase of equity securities
9 held by those mutual fund plaintiffs.

10 A. Substantially, yes.

11 Q. And I won't go through it all again, but just so we're
12 clear, that means that the mutual fund plaintiffs would invest
13 in an equity security when the stock price and the market for
14 that security is less than the intrinsic value of the security
15 calculated using the private market valuation methodology?

16 A. That's the stated objective, yes.

17 Q. And the way that you think about it is that if the stock
18 price is indeed below the private market valuation, then the
19 stock is undervalued, correct.

20 A. Relative to the private market value, yes.

21 Q. And that's actually how this kind of value investing works,
22 right? Because if the stock price is below the private market
23 valuation, then you are actually obtaining a security that has
24 more value than that represented by the stock price that you're
25 paying for it, correct?

1 A. Relative to the future value.

2 Q. Can you answer my question, sir?

3 A. You want to repeat the question, please?

4 Q. I just want to make sure that I understand this is how this
5 type of value investing works. You are looking to purchase
6 securities that you think have a greater value than that
7 represented by the actual stock market price of that security,
8 correct?

9 A. A greater potential value.

10 Q. But greater value, correct?

11 A. Potential value.

12 Q. Well, let's look at some examples. You have a binder in
13 front of you, sir?

14 THE COURT: You have the binder, right?

15 THE WITNESS: Yes. I didn't hear that.

16 THE COURT: Yes.

17 Q. Can I take you first to Exhibit Z, which should be in your
18 binder.

19 MR. CAMERON: And I believe this is already in
20 evidence, your Honor.

21 A. Yes, I have it.

22 Q. Have you seen this before, sir?

23 A. Yes.

24 Q. And the -- this is the annual report from the Gabelli Asset
25 Fund dated September 31, 2001, correct?

1 A. Yes.

2 Q. What I'd like to take you to, please, is page five. Do you
3 have that, sir?

4 A. Yes.

5 Q. Do you see the heading investor psychology?

6 A. Yes.

7 Q. Let me read this paragraph for you: Of course, intrinsic
8 value and equities prices are horses of two very different
9 colors. Remember the emotional Mr. Market often values stocks
10 materially above and substantially below intrinsic value.

11 Did I read that correctly, sir?

12 A. Yes.

13 Q. Do you agree with that?

14 A. It's not -- yes. Yes.

15 Q. And that, in fact, is what the Gabelli Asset Fund was
16 telling its own investors in its annual report for December 31,
17 2001, correct?

18 MR. CAPPUCCI: Objection, your Honor.

19 THE COURT: Sustained. I don't know what you're
20 referring to. You mean in this --

21 MR. CAMERON: The entire document. This is the annual
22 report.

23 THE COURT: In the entire Exhibit Z, but that's a
24 rather long report to say, boil it down to telling the
25 investors that. I think you have to be more specific.

1 MR. CAMERON: I'll move on, your Honor.

2 THE COURT: All right.

3 BY MR. CAMERON:

4 Q. Can you look at Exhibit E, please.

5 A. Yes, I have it.

6 Q. And before I proceed, I just want to be clear, I think you
7 mentioned before that the private market value captures
8 potential value, is that right?

9 A. Yes.

10 Q. Does the stock market price on a particular day capture
11 that potential value?

12 MR. CAPPUCCI: Objection.

13 THE COURT: He can answer it.

14 A. I don't analyze individual stock prices. You would think
15 that there is a discount of all of the factors that affect the
16 market price in determining what that price should be. So I
17 can't answer that.

18 Q. So do you know one way or the other?

19 A. No.

20 Q. Can you look at Exhibit E, please. Have you seen this
21 document before, sir?

22 A. Yes.

23 Q. And is this the annual report dated December 31, 2000, or
24 for the period ended December 31, 2000 of the Gabelli Equity
25 Trust, Inc.?

1 A. Yes.

2 MR. CAMERON: And this is already also in evidence,
3 your Honor.

4 Q. Would you turn to page 181.

5 A. I have it.

6 Q. And in the middle of that first paragraph of text it says,
7 our portfolio is full of small companies trading at discounts
8 to private market value, defined as the price an informed
9 industrialist would be willing to pay for the company's assets.

10 Do you see that?

11 A. Yes.

12 Q. And is that consistent with the fact that the mutual fund
13 plaintiffs identified companies or securities for purchase
14 based upon the existence of a discount of the stock price below
15 the private market value for that company?

16 A. Yes.

17 Q. And again, that's consistent with the type of value
18 investing that we were talking about?

19 A. Yes.

20 Q. Last one. Can you turn to a document, AR, please,
21 Exhibit AR.

22 A. Yes.

23 Q. And, sir, this is also in evidence. This is the Gabelli
24 Asset Fund's annual report for December 31, 2002. Do you see
25 that?

1 A. Yes.

2 Q. And if I can take you, please, to page 66.

3 A. Yes.

4 Q. And the last paragraph on that page, it's page four of the
5 report, reads, in the mid-'70s we originated and focused a
6 valuation methodology based on private market value.

7 Do you see that?

8 A. Yes.

9 Q. So, again, is it fair to say, sir, that the investment
10 decisions that were being made by the mutual fund plaintiffs
11 during the relevant period were based upon this private market
12 value methodology?

13 MR. CAPPUCCI: Objection, your Honor.

14 THE COURT: Right, as is stated, but not for the
15 reason you think.

16 You just read that sentence from the report, so leave
17 it at that.

18 THE WITNESS: I don't --

19 THE COURT: I don't think you have anything to answer.
20 That's what it says.

21 MR. CAMERON: All right, your Honor. I have no
22 further questions.

23 THE COURT: Okay. Thank you. Mr. Cappucci?

24 MR. CAPPUCCI: I'll be brief, your Honor.

25 - - - - -

1 CROSS EXAMINATION

2 BY MR. CAPPUCCI:

3 Q. Mr. Alpert, you had no involvement in any of the
4 transactional decisions regarding Vivendi securities which are
5 the subject of this case, correct?

6 A. Correct.

7 Q. Okay. You are, though, a senior, if not the senior officer
8 at many of the plaintiffs in this case, correct?

9 A. Yes.

10 Q. You have a financial background which you just identified
11 for the Court. So I'd like you to go to Defendant's Exhibit E,
12 which, again, is the annual report for the Gabelli Equity Trust
13 for the period ended December 31, 2000. And turn to page 202,
14 which is 26 of the document.

15 And it is a letter to the board of directors of the
16 Gabelli Equity Trust by the firm of PriceWaterhouseCoopers. Do
17 you see that?

18 A. Yes.

19 MR. CAMERON: Which page?

20 MR. CAPPUCCI: This is page 202, page 26 of the
21 document.

22 Q. Now, sir, you have an accounting background. Please
23 explain to the Court basically what the opinion is here, what
24 the auditors are saying.

25 A. This is a report to the directors and shareholders of the

1 Gabelli Equity Trust from the independent registered accounting
2 firm PriceWaterhouseCoopers which gives an opinion on the
3 fairness of the financial statements, of the equity trusts.

4 Q. Fairness in what respect?

5 A. That it's in accordance, prepared in accordance with the
6 generally accepted accounting principles and has been conducted
7 under the general auditing standards at the time.

8 Q. What about accounting policies that are applied by the
9 firm? Are they blessing that, and to the extent they've
10 reviewed those processes?

11 A. They're saying that the policies and procedures in terms of
12 valuation have been applied consistently throughout the period.

13 Q. Okay. Fine. Turn to page 197 of the document, which is
14 page 21. Gabelli Equity Trust, Inc. notes the financial
15 statements, significant accounting policies, generally for the
16 Court -- and for the benefit of the Court and those in here,
17 what's being presented here in terms of accounting, significant
18 accounting policies?

19 A. How we value the individual securities that are held in the
20 portfolio.

21 Q. I'll get to that, but just generally, is it not the case
22 that these are the significant accounting policies which are
23 applied by the firm for the purposes of its preparation of the
24 account -- of the financial statements?

25 A. Yes.

Q. So in other words, these are your financial statements.

You apply methodology -- accounting policies, and then that's all -- that's all reviewed by the outside auditors, correct?

A. Yes.

Q. PriceWaterhouse, again, as this document shows, passed upon the methodology.

Now, with respect to security valuation, what does it say here in terms of security valuation?

A. It identifies the process we use to assign a value to each individual holding within the portfolio.

Q. Okay. I want to read a sentence to you: Security valuation, portfolio securities listed or traded on a nationally recognized securities exchange, quoted by the National Association of Securities Dealers Automated Quotations Inc., NASDAQ, or traded on a foreign exchange, are valued at the last sale price on that exchange as of the close of business on that date.

Do you see that?

A. Yes.

Q. What does that mean?

A. We take a closing market price on the individual exchange upon which a security trades.

Q. Now, I want you to go in that same report -- just give me a moment -- to the section where it provides a breakdown of the holdings in the trust. Do you see that? This would begin on

1 page 14.

2 A. This is the schedule of investments.

3 Q. Yes.

4 A. Or portfolio of investments.

5 Q. Yes.

6 A. I have it.

7 Q. Can you see -- can you find for us whether Vivendi is
8 reflected -- a position in Vivendi is reflected in that
9 schedule? And I'll direct your attention to page 17, to make
10 it faster.

11 Do you see that, sir, left-hand column at the bottom
12 of the section entitled business services?

13 A. Yes, I see that.

14 Q. Okay. I see 220,000 shares, Vivendi Universal, S.A. ADR.
15 I see a number for cost and a number for market value. Sir, is
16 this saying that you're valuing that holding in Vivendi ADRs at
17 market?

18 A. At the market price that closed on December 31st.

19 Q. If I call you up, sir, and I have an account with you in
20 the equity trust, and I want to know the net asset value, what
21 is that going to be based on?

22 A. Closing market prices of the individual securities, plus or
23 minus other assets and liabilities.

24 Q. Would you use PMV?

25 A. No.

1 Q. Okay.

2 MR. CAPPUCCI: No further questions.

3 THE COURT: Anything further for this witness?

4 MR. CAMERON: Nothing further, your Honor.

5 THE COURT: Thank you.

6 (Witness excused)

7 MR. SAUNDERS: Your Honor, our next witness is Hart
8 Woodson, who we would present to the Court by deposition.

9 The deposition is two hours long, I'm sorry to say.
10 We've tried to cut it down by taking out all of the pauses, but
11 it's still two hours. So with your Honor's permission -- do
12 you want to see it, or do you want to read it?

13 THE COURT: It's up to you. I don't want to read it
14 by myself. If you want to read it in court --

15 MR. SAUNDERS: We have it on video.

16 THE COURT: -- it's the same to me.

17 MR. SAUNDERS: It's entirely up to you, your Honor.

18 THE COURT: The video and the reading are the same to
19 me, I think, unless one is faster than the other.

20 MR. SAUNDERS: They ought to be exactly the same, if I
21 read it correctly.

22 THE COURT: No, because a witness can pause and think
23 whatever. The reading should theoretically be faster than
24 videotape.

25 MR. SAUNDERS: I think you're right. I think

1 theoretically reading it would be faster than the video, but
2 you won't get a chance to evaluate the witness.

3 THE COURT: All right. Well, let's start with the
4 video, then.

5 MR. SAUNDERS: You know, if it's getting tedious,
6 we'll switch. I think you have -- you ought to have a chance
7 to see the witness.

8 THE COURT: I know that the lawyers, whatever,
9 collectively asked my chambers first if I would just read it in
10 the privacy of my study, so to speak. And I said no. And I
11 know the truth is because it's hard to concentrate. You find
12 yourself wanting to do everything but read it. You start out
13 reading it, then you read something else, and then you look at
14 the news, then you do something else, and you don't want to
15 read it.

16 So let's do the videotape.

17 MR. SAUNDERS: So maybe we start. And, your Honor, if
18 you think it's getting tedious, just let us know and we'll
19 switch.

20 THE COURT: Okay. For those who don't want to sit
21 through two hours of this, feel free to walk out.

22 MR. CAPPUCCI: Thank you, your Honor.

23 THE COURT: I'm serious.

24 MR. CAPPUCCI: I'm only kidding.

25 THE COURT: I'm serious. Not everybody needs to sit

here and listen to two hours they've heard many times, because it's the rest of the afternoon.

MR. CAPPUCCI: Could I maybe have some of my associates go back to the office, your Honor?

THE COURT: Of course. I just said that. Seriously.

MR. CAPPUCCI: Thank you so much.

THE COURT: Seriously. They're all invited to do that.

MR. CAPPUCCI: Can we take two seconds while they're setting up?

MR. SAUNDERS: One more thing I just need to mention, then we can take a break. Some of the exhibits that Mr. Woodson is going to testify about are exhibits to which the plaintiffs have objected. They haven't objected to the deposition.

THE COURT: I understand.

MR. SAUNDERS: But they've objected to some of the exhibits. I have those, if you'd like to see those, your Honor, and rule on them. I can pass them up to you in a book.

THE COURT: Okay.

MR. SAUNDERS: I think there are four exhibits I'm told, your Honor.

THE COURT: All right. Mr. Saunders, the one to which there is not objection your tech person will be putting up or no?

1 MR. SAUNDERS: They are -- all exhibits to which
2 Mr. Woodson refers in the deposition have been objected to.

3 THE COURT: Oh, all. Okay. Oh. So they're all in
4 the book?

5 MR. SAUNDERS: They're all in the book. I think there
6 are four of them.

7 THE COURT: They've all been objected to?

8 MR. SAUNDERS: Right. I don't know whether those
9 objections are still being maintained or not.

10 THE COURT: Maybe that's the way to pass the time.
11 I'll just do the objections first, without context.

12 MR. SAUNDERS: That might make sense, your Honor.

13 THE COURT: Let's see. Who's handling the objections?
14 Mr. Cappucci?

15 MR. SAUNDERS: Mr. Raciti, are you going to do it?

16 MR. RACITI: Let's wait for Mr. Cappucci.

17 MR. SAUNDERS: While we're waiting, your Honor, I do
18 have one thing that I would like to note for the record. You
19 will see that in our joint pretrial order, we have a section of
20 undisputed facts.

21 THE COURT: Yes.

22 MR. SAUNDERS: And undisputed fact number ten is that
23 during the relevant period, I think the Vivendi stock traded in
24 an efficient market.

25 THE COURT: Yes.

MR. SAUNDERS: I simply wanted to explain that what we meant by saying that, what we on our side meant by saying that is that the stock met the Cammer factors. I just wanted to note that for the record, in case there's ever any later explanation about what an efficient market means, we had in mind that we met the Cammer factors.

MR. CAPPUCCI: That's fine. We like Cammer.

THE COURT: Now, what Mr. Saunders said when you were referring or saying good-bye to colleagues is there are four exhibits that he's handed you in the book.

MR. CAPPUCCI: Your Honor, we're on the same page.

THE COURT: Okay. So there are four exhibits to which you objected that are part of the Woodson deposition. I said maybe I can handle the objections first, so maybe it would be even smoother.

MR. CAPPUCCI: Your Honor, I've looked at these. Other than relevance and hearsay, I'm not -- which we're not going to debate here, okay?

THE COURT: We're not going to debate?

MR. CAPPUCCI: I would rely on you to weigh the evidence. But there is one exhibit which has an authenticity issue. It's Exhibit C.

THE COURT: Let me see if I can figure out which is C. I only have them written as 3, 4, 5 and 6.

MR. CAPPUCCI: It's a PMV worksheet.

1 THE COURT: I only have 3, 4, 5 and 6.

2 MR. CAPPUCCI: Handwritten.

3 THE COURT: Mr. Saunders?

4 MR. SAUNDERS: It's the last tab in your book,

5 Exhibit 6.

6 THE COURT: Go ahead.

7 MR. SAUNDERS: In the Woodson deposition.

8 MR. CAPPUCCI: And it has handwriting on it, and we
9 don't know whose handwriting it is.

10 THE COURT: Okay.

11 MR. SAUNDERS: I think, your Honor, the record will
12 reflect tomorrow that that's Mr. Gabelli's handwriting.

13 THE COURT: I'll take it what they call subject to
14 connection, if Mr. Gabelli says it's his. If he says he
15 doesn't recognize it, then I won't.

16 MR. CAPPUCCI: That was the only --

17 THE COURT: All right. So with that, the objections
18 are withdrawn and all the Woodson exhibits are coming in except
19 6, which is taken subject to connection, depending on what
20 Mr. Gabelli says tomorrow.

21 MR. CAPPUCCI: Your Honor, if I can make one point
22 with respect -- just with respect to the relevance, if there
23 were documents which are referring to other portfolios that are
24 not part of this case, we felt some of it may not have
25 relevancy, but that will be borne out, I believe, in the

1 testimony.

2 THE COURT: Okay.

3 MR. CAPPUCCI: Thank you.

4 MR. SAUNDERS: With that, your Honor, we call as our
5 next witness Mr. Hart Woodson by deposition.

6 (Video played)

7 THE COURT: Well, we finished the deposition reading.
8 I must say, as I think some kind of retribution for forcing me
9 to sit through that for two-and-a-half hours, that each side
10 should highlight in yellow pen, yellow highlighter, what they
11 think was relevant to the issue we're trying, because I'm
12 convinced I heard much that was relevant to the issue we're
13 trying. At the time he was deposed maybe you didn't know that
14 we would narrow the case so much. So if you would, each side,
15 take a yellow highlighter -- not both yellow; yellow for the
16 defense, pink for the plaintiff -- and point out what you think
17 was really important there.

18 MR. SAUNDERS: We'll be happy to do that, your Honor.

19 THE COURT: I'm serious. That's an assignment:
20 Yellow, pink, highlighter.

21 MR. SAUNDERS: If I could make just a couple of
22 statements for the record.

23 First, there were references to five exhibits during
24 the course of that testimony. And I could just give the
25 corresponding defendant's exhibit numbers.

MR. CAPPUCCI: Why don't we clean it up for the Court, Paul, and do a separate submission on the transcript. Sounds like we've got some work to do with this.

THE COURT: That would be a good idea.

MR. CAPPUCCI: You may not want to put that stuff in.

THE COURT: The purpose of the reading -- I followed it in the book. I see you want to translate those into the defense exhibit letters.

MR. SAUNDERS: I think they're already in evidence.

THE COURT: I know, but if you would just send that over as a letter or something.

MR. SAUNDERS: I'd be happy to do that.

THE COURT: That would be easier.

MR. SAUNDERS: Also, your Honor, just there are two other places where Mr. Cappucci and I can agree that the witness confused private versus public market value in his answer. And the two that we've identified, the first one is in the portion of the answer that begins on transcript page 145, line 22, and ends on transcript page 146, line 7. The witness inadvertently, I suppose, transposed the words private versus public. So we can stipulate that he meant to transpose those words at that place in the transcript.

Similarly, we agree that on transcript page 200, line 12 to line 15, the witness inadvertently, I think, reversed the words private and public when he was referring to values.

1 THE COURT: I don't think I have a whole transcript
2 now, but when you submit the marked transcript, the one that
3 will have yellow for the defense and pink for the plaintiff,
4 you can go ahead and circle that and make the change in the
5 margin --

6 MR. SAUNDERS: Thank you, your Honor.

7 THE COURT: -- so that I see it that way.

8 When are you going to submit those marked transcripts?

9 MR. SAUNDERS: We can do it tomorrow morning, if you
10 like.

11 MR. CAPPUCCI: Wednesday.

12 THE COURT: Wednesday sounds better. Why should you
13 have to read that thing again tonight? Wednesday sounds fine.

14 MR. SAUNDERS: That's fine.

15 THE COURT: All right. What do we pick up with
16 tomorrow?

17 MR. SAUNDERS: The next witness we have is
18 Mr. Gabelli, and I understand that he's not available until
19 tomorrow afternoon.

20 THE COURT: Yes. And how are we using the morning?

21 MR. CAPPUCCI: I believe we contacted the Court about
22 this last week. We spoke to Jim.

23 THE COURT: I don't recall. What, and miss the
24 morning?

25 MR. CAPPUCCI: No. What we intended, both of us, was

that the deposition transcript would be read tomorrow morning. I believe the Court wanted to start at 10:00 and then was taking an early break. So we had Mr. Gabelli, who was flying in, to be available for the entire afternoon. That would be our last witness. So at this juncture --

THE COURT: In other words, you have no witnesses?

MR. CAPPUCCI: The last witness is Mario Gabelli. He is going to be here at 2:00. We thought the Court would be appreciative of that and perhaps free up the calendar for other things.

THE COURT: No, I didn't think I understood it, so that's too bad. Breakdown in communications with staff. But there's nothing I can do about it now, because I can't have the summation before that.

So how long do we think he'll last on the stand?

MR. SAUNDERS: Probably an hour on direct.

MR. CAPPUCCI: Half an hour on cross.

THE COURT: So there will still be time for you to try to pull it together?

MR. CAPPUCCI: There will be time. And how long would you like for the closings, your Honor?

THE COURT: Whatever it takes. Whatever it takes.

Okay. That's it, then.

MR. CAPPUCCI: So I can't see more than a half an hour each side on closings. I'm just trying to get a --

1 THE COURT: I'm not going to tell you. Whatever it
2 takes you. Say what you have to say without repeating yourself
3 endlessly.

4 So apparently I don't see you until 2:00?

5 MR. CAPPUCCI: That's correct.

6 THE COURT: Okay. Very good. Thank you. See you
7 then.

8 MR. CAPPUCCI: Thank you, your Honor. Sorry for any
9 miscommunication with the Court.

10 THE COURT: I'm sure it was in my chambers.

11 (Adjourned to February 19, 2013, at 2:00 p.m.)
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